THE AMORPHOUS RELATIONSHIP BETWEEN CONGRESS AND THE COURTS

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The relationship between the judiciary and Congress is a complex relationship that is poorly defined or understood. Some have argued that the Constitution safeguards the independence of the judicial branch from political pressures by guaranteeing life tenure and by precluding downward adjustment of judicial salaries. Nevertheless, Congress retains important power over the court system. The Constitution grants Congress the power to make regulations and exceptions to the appellate jurisdiction of the Supreme Court, although the Constitution sets the outer limits of the jurisdiction of the federal courts. The Constitution also vests Congress with the power “to constitute Tribunals inferior to the Supreme Court.” The lower federal courts—what Article III terms “inferior courts”—are created by statute, a result of the so-called “Madisonian Compromise.” From the Judiciary Act of 1789 through contemporary disputes over, for example, breaking up the liberal Ninth Circuit, Congress has played
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A key role in designing, organizing, and defining the role of the inferior courts in the federal system. Likewise, the Constitution does not articulate what legal doctrines must shape judicial decision making or even if judiciary has the authority to strike acts of Congress down.

The result of the ambiguity that exists is an ill-defined relationship between Congress and the courts. Whereas Congress’s relationship with the executive is spelled out in detail in the Constitution, the relationship between Congress and the judiciary was left by the founders to be defined by history. Since history is rarely tidy or consistent, the relationship that exists between the courts and Congress is as messy as the Constitution itself.

The murkiness of the relationship that exists stems from several factors. First, the relationship has clearly changed over time. Second, modern accounts of the relationship have produced a set of theoretical claims that have been empirically difficult to validate. Third, the multiple dimensions of the interdependence of the two institutions makes it hard to ascertain whether Congress is constrained by the law and whether the Court is constrained by Congress.

THE EVOLUTION OF CONSTITUTIONAL INTERPRETATION

Today, debates about the relationship largely focus on the ability or likelihood of Congress to constrain the judiciary and the judiciary’s willingness to limit the actions of the elected branches. These debates have become central, thanks in part to two important historical patterns. First, Congress has largely, albeit not completely, abandoned its role as an interpreter of the Constitution. Second, the federal judiciary has become a venue for policymaking.

Who interprets?

In contemporary American government textbooks, the respective roles of Congress and the Supreme Court are agreed upon and seem relatively clear: the former legislates within the boundaries of the Constitution, while the latter interprets the Constitution and decides where these boundaries lie, with the ability to invalidate acts of Congress it deems unconstitutional through judicial review.

This textbook view was not always held, and is not necessarily the inevitable result of the logic of the Constitution. Contemporary constitutional scholars, most notably Keith Whittington, argue that constitutional interpretation has not always been the exclusive purview of the courts, and that it may not be even today (see...
also Devins and Fisher 2004; Fisher 1988; Ackerman 1991). According to Whittington, this power was gradually ceded to the courts by the elected branches of government through distinctly political (as opposed to legal or constitutional) processes, and the elected branches retain the ability to exercise or reclaim some of this power in certain circumstances (Whittington 2007, 2009).

In the early years of the republic, according to Whittington, there were two competing theories of constitutional power: judicial supremacy and departmentalism. Judicial supremacy, as the name implies, holds that the judicial branch is the ultimate constitutional authority, while departmentalism (favored by Thomas Jefferson, among others) envisions each branch of government playing a role in constitutional interpretation (Whittington 2007, xi). While conventional wisdom holds that judicial review and judicial supremacy sprang suddenly into being through the legal maneuverings of the Marshall Court in the Marbury v. Madison decision, Whittington argues that these concepts developed gradually throughout the nineteenth century. (2007, 2009) “[B]y the 1850s,” according to Whittington, “the federal courts had become a forum within which constitutional objections to federal legislation could be raised and resolved” (2009, 1259). By the mid-twentieth century, the time of the Warren Court, the doctrine of judicial supremacy had clearly won out, to the point where the Court explicitly stated in Baker v. Carr (1962) that it was the “ultimate interpreter of the Constitution” (cited in Whittington 2007, 3).

According to Whittington, however, this state of affairs was not merely the result of the actions of the Court itself. The elected branches of government played a role in transferring supreme constitutional authority to the judicial branch because it was in their political interests to do so. Whittington offers a number of scenarios in which judicial supremacy could be advantageous to elected leaders. For example, the leaders of an embattled governing coalition can avoid making unpopular decisions by deferring to the judgment of the Court, as President Buchanan did on the question of slavery in the 1850s and President Carter did on the question of abortion in the 1970s (Whittington 2007, 66–9). In other words, judicial supremacy offers a way for elected leaders to attempt to depoliticize controversial issues that threaten their governing coalitions. Similarly, judicial supremacy may offer elected leaders the opportunity to attain desirable policy outcomes without incurring the transaction costs of organizing coalitions in the elected branches. Graber (1993, 36) articulates this argument:

Historically, the justices have most often exercised their power to declare state and federal practices unconstitutional only when the dominant national coalition is unable or unwilling to settle some public dispute. The justices in these circumstances do not merely fill a void created by the legislative failure to choose between competing political proposals. On the contrary, prominent elected officials consciously invite the judiciary to resolve political controversies that they cannot or would rather not address.

Of course, elected officials have frequently resisted judicial supremacy. Whittington cites several important “reconstructive” presidents (e.g., Jackson, Lincoln, Franklin Roosevelt and others) who were successful in wresting some measure of constitutional power from the Supreme Court. According to Whittington, only a president
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(and a rare president at that) is able to muster the type of political force necessary for this kind of high-profile challenge. Nonetheless, he argues that Congress is still capable of challenging and criticizing the Court over specific issues (2007, 15–16). Furthermore, a head-on challenge to the Court is not the only way that Congress can play a role in constitutional interpretation. Gant (1997) offers the example of a section in the 1965 Voting Rights Act in which Congress prohibited states from denying the vote to people educated in Spanish language schools in Puerto Rico on the basis of their inability to speak English. Congress acted in this instance based on its own interpretation of the enforcement clause of the Fourteenth Amendment, an interpretation that was more expansive than that laid out in previous Supreme Court decisions, and the Court ruled that it was appropriate for Congress to do so in Katzenbach v. Morgan. (Gant 1997, 374–5) In another study, Whittington finds that a surprising range of congressional committees discuss constitutional issues in their public hearings, implying that members of Congress see some role for themselves in constitutional interpretation (Whittington 2005), even as there is evidence that congressional invocations of constitutionality are largely instrumental (Pickerill 2004, 8).

The larger point to be taken from this literature is that constitutional authority is structured by politics, and as such it is dynamic. While Congress may not be in the position to launch a full-scale assault on the interpretive authority of the Supreme Court, it still plays a real and arguably legitimate role in constitutional interpretation.

Having said this, the Court’s dominant role in the interpretation of the Constitution has helped to cement the legitimacy of judicial review. This review is critical to ensuring the Court a role in the policy making process.

Who makes policy?

The second important element in shaping judicial-legislative relations in the twenty-first century is the politicization of the law (Ferejohn 2002; Kagan 2001; Lovell 2003; Burke 2004; Barnes 2004; Silverstein 2009). Rather than viewing the courts as merely a mechanism for clarifying legal ambiguities and for enforcing the law, legal venues are increasingly being used as a mechanism for pursuing one’s policy goals. There are several reasons for this. First, as Congress itself has carved out a more active role for the federal government, they inevitably created the opportunity for a more aggressive use of the courts. Laws such as the 1964 Civil Rights Act and the Clean Water Act invited increased litigation. Congress itself realized that by incentivizing private parties to utilize the courts it could simultaneously incentivize private actors to regulate market behavior through adjudication and to ensure compliance with congressional preferences (Farhang 2009). Second, organized interests have found that the judiciary itself is a viable (and frequently less costly) alternative to congressional incapacity. Evidence of the law’s politicization is clear. Perhaps, the most important indicators are that more disputes are taken to the legal system. For example, in 1961 approximately 13,500 statutory claims were filed in Federal District Courts. In 1970, close to 40,000 statutory claims were filed; in 1980 more than 75,000 claims; in 1990 over 125,000 and
by 1998 close to 160,000 claims (Barnes 2004; United States 2000).¹ These disputes are also drawing in more actors. Between 1958 and 1961, an average of 4,75 Supreme Court amicus briefs were filed each year by public interest groups or law firms. Between 1978 and 1981, interests groups filed an average of 45.5 briefs each term. Between 1986 and 1990, an average of 103 Supreme Court briefs were filed each year (Epstein, Segal, et al. 2003, 689). Once again, the pattern is clear. Organized interests are increasingly using the courts as a vehicle for pursuing and protecting their policy agendas.

It is not surprising that gun control groups, property right groups, anti-smoking groups, pro-choice groups, organized labor and environmentalists utilize the legal process to pursue agendas that might not be implemented by elected officials (Silverstein 2009). While Congress and the courts expanded the definition of “public law” through both statute and legal precedent, organized interests further pushed the aggressive use of the judiciary to accomplish policy goals. When legislators seem unable and unwilling to definitively resolve controversial policy questions, adversaries not surprisingly turn to the courts to pursue their agenda (Lovell 2003).

Through both congressional intent and congressional neglect and with legal precedent providing less and resistance, the definition of public law has expanded. It is this phenomenon that recently led Justice Antonin Scalia to question “the propriety, indeed the sanity, of having value-laden decisions such as these [capital punishment, abortion, and physician-assisted suicide] made for the entire society . . . by judges” (Belkin 2004). Although lawmakers seem incapable of erecting barriers between the judiciary and the policy arena, it is also fair to note that as the courts have become increasingly controversial and accessible policy makers, rather than merely interpreters of legal facts and cases, the Congress and the President have tried to block each other’s attempt to influence the judiciary. Given the stakes of Court decisions, neither is willing to allow another branch unfettered influence over the judiciary and its pivotal legal choices.

## The Congressional Response to the Court

As the judiciary has become more active in the policy arena, members of Congress have spent more time shaping and responding to the Federal bench. Political scientists have argued that this response is manifested in three different ways. First, Congress adopts legislation with an eye to impending judicial review. Second, Congress utilizes its power to retaliate against a judiciary that ignores its interests. Third, Congress plays a more assertive role in the nomination process.

¹ Although we are reporting on Federal trends, since Congress has a direct impact on federal law and the federal judiciary, there has inevitably been a politicization in state courts too.
Legislative anticipation of judicial review

Although there is a great deal of empirical and theoretical exploration to be done, congressional anticipation of judicial review has altered the legislative process and legislation. Until the end of the twentieth century, the anticipation effect of judicial review was mainly described in terms of congressional attempts to shape the legislative histories upon which the Court would rely in its review and interpretation of statutes. For example, Katzmann (1997) calls for Congress to improve legislative drafting; have committee members sign committee reports; and have floor managers designate specific floor colloquies as authoritative.

Over the past two decades, scholars interested in the relationship between the courts and Congress have tried to explore when and why Congress systematically attempts to shape the judicial review and interpretation process. It is clear, that in the area of administrative law, Congress has the capacity to establish the parameters of judicial review. In particular, Congress has used the legislative process to structure judicial review so that policy outcomes are closer to its preferences. It can do this by specifying what agency provisions can be reviewed; expanding standing; and by specifying the venue where review will take place (Baum 2011). All of these tactics are crafted by Congress to ensure an outcome consistent with its preferences (Shipan 2000; Eskridge 1991; Eskridge and Ferejohn 1992; McNollgast 1995; Spiller and Gely 1992).

The most sophisticated of the studies have tried to identify when various policy alignments have produced specific review alignments. Although a great deal of theoretical firepower has been directed at dissecting congressional manipulation of judicial review, theoretical and empirical limitations abound. On the theoretical front, most of the work has been restricted to preference-based models. Accordingly, Congress defers to the Court when judicial preferences will produce a favorable outcome. Such models are based upon the assumption that the judiciary itself bases its decisions upon policy preferences. Although some judicial scholars accept this (most notably Segal and Spaeth 2002), there is also solid empirical evidence that legal rules structure the decisions made by judges (Bailey and Maltzman 2008; Richards and Kritzer 2002; Friedman 2006). Indeed, there is a great deal of evidence that precedents of the Court (such as Chevron) have discouraged the judiciary from actively engaging in the review of administrative decisions (Richard, Smith, and Kritzer 2006).

A number of studies have begun to provide empirical examples and descriptions of the political design of judicial review. One of the most thorough discussions of the political battles over the specification of review can be found in Light’s (1992) analysis of Congress’s decision to change the law that for decades had precluded judicial review of decisions about veterans’ medical benefits. Cass (1989) and Shipan (1997a, 1997b) provide detailed analyses of legislative battles over review provisions during the writing of the Communications Act of 1934. Smith (1997, 1998) demonstrates that members of Congress battled over the extent to which courts should be allowed to review the actions of the Environmental Protection Agency during each of the attempts to amend the Clean Air Act during the past thirty years. Spiller and Tiller
(1997) also show how Congress attempted to use decision costs to affect judicial review in the Comprehensive Regulatory Reform Act of 1995 and the 1975 Bumpers Amendment.  

While much of this empirical evidence is persuasive about specific instances, it has largely taken the form of case studies rather than large-N analyses. This stems from the difficulty associated with collecting the data needed. In particular, scholars have been hindered by the lack of good cross-institution preference measures and the expense associated with systematically coding review provisions, although this is changing (Bailey 2007). The problem is further exacerbated by the fact that neither the courts nor Congress is a unitary actor. Thus, identifying what Congress (or the judiciary) want is complicated. Does the House median, the Senate median, the Senate majority party median, the House majority party median, the filibuster pivots, or the enacting legislature's preferences reflect what the Congress wants? Likewise, what judge or justice represents judicial preferences?

Congressional reaction to hostile Court activity

Despite the fact that judges are involved in the policymaking process and that Congress tries to shape judicial decision-making, there is no widespread tendency of Congress to override the courts. Decisions of the federal judiciary produce frequent criticism by members of Congress (Eskridge 1991; Barnes 2004) and rarely successful overrides. As we explain below, political scientists normally portray the courts adopting policies that fall within a range defined by the House, Senate, and the President as acceptable (often referred to as the Pareto set as a move from any point within this range will make at least one actor worse off). The Court’s ability to do this stems from the fact that political scientists have typically assumed that each branch of government can understand the others’ intentions and capabilities.

For example, in classic separation of power models, justices do not craft opinions they know will be overridden by Congress, and Congress does not pass laws likely to be struck down or interpreted in a manner hostile to Congress’s interests (e.g., Ferejohn and Shipan 1990). In other words, they know how others will react, and alter their actions accordingly. In many respects, then, political scientists who explore inter-institutional relations downplay the sorts of interactions that occur across and between institutions. In reality, of course, the assumption of complete information and unitary actors within institutions is tenuous: the transmission of information between the branches is less than perfect and multiple players matter within each branch. Members of Congress lack the capacity to perfectly anticipate future judicial decisions, and judges cannot anticipate how institutions composed of elected officials will respond.  

Hence, the courts regularly thwart congressional goals, and Congress on occasion overrules judicial attempts at policymaking. For example, according to

2 The 1975 Bumpers amendment to the Administrative Procedures Act was designed to encourage courts to be less deferential toward federal agencies. For a discussion of the act, see Levin 1983.

3 It is possible that Congress occasionally adopts legislation that it knows is unconstitutional, but that will enable it to make a political statement.
Hettinger and Zorn, Congress overrides 12 percent of the Court’s labor and antitrust decisions. Similarly, Hausegger, and Baum (1999) inform us that Congress attempts to override the Court approximately six percent of the time.4

Recently, political scientists have tried to move beyond a debate as to whether Congress attempts to override the Court. In particular, political scientists have started to develop a more sophisticated portrait of the relationship that exists between Congress and the courts. This portrait has been elaborated upon in two ways. First, scholars have started to build models that take into account the Court’s recognition that Congress is not a unitary actor. For example, Ferejohn and Shipan (1990) develop a model that incorporates both the preferences of the Court and Congress, but also of key legislative leaders who hold formal positions via the committee system. Second, scholars have started to recognize the branches are imperfect at anticipating the actions of each other (Barnes 2004; Katzmann 1988). Instead of clearly articulating the law, Congress routinely obscures its true preferences in vague language. Likewise, judicial outcomes are difficult to predict when Congress frequently does not know what context in and with what judge a case will appear in and who will be on the federal bench.

In Barnes (2004), the author asks a question that students of American politics have ignored for too long: what happens when Congress adopts legislation that undoes the judiciary’s interpretation of a federal statute? Barnes demonstrates that when Congress passes legislation to override a decision of the bench that involved statutory interpretation, the Court tends to be more deferential to Congress on subsequent rulings involving the same law. Even though meaningful dialogues between the Court and Congress are rare, when they do occur they tend to result in a resolution of conflict.

Congressional assertiveness in the nomination process

The increased involvement of judges in the policy making process has led both members of Congress and legislative scholars to focus on the Senate’s role in the confirmation process. There has also been more coverage of the Court in the press and, especially since the failed Bork nomination of 1987, more attention to the process from interest groups. The situation becomes all the more intense in light of the limited opportunities to shape the judiciary via the confirmation process. On the federal trial and appellate benches, the turnover rate is approximately 4 percent each year (Carp, Manning, and Stidham 2004). On the Supreme Court, the turnover rate throughout our nation’s history has been approximately one justice every two-year period.

The Senate and Lower Court confirmations

When it comes to district and circuit appointments, individual senators often have the incentive and power to restrict the president’s choices.5 Senators’ influence arises

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4 For a discussion of this distinction and its significance, see Brenner and Whitmeyer (2009, 118–19).

5 For a comprehensive overview of the nomination and confirmation process, see Goldman 1997; Epstein and Segal 2005; and Binder and Maltzman 2009.
from several corners. First, the geographic design of the federal courts strongly shapes the nature of Senate involvement in selecting federal judges. Because federal trial and appellate level courts are territorially defined, each federal judgeship is associated with a home state, and new judges are typically drawn from that state. As a result, senators attempt to influence the president’s choice of appointees to federal courts in their states.

Second, Senate procedures that empower individual senators curtail a president’s power. Although the Constitution prescribes Senate “advice” as well as “consent,” nothing in the Constitution requires the president to respect the views of interested senators from the state. In practice, however, judicial nominees must pass muster with the entire chamber. Senate procedures that enable a minority of Senators to block a nominee with a filibuster make Senate leaders reluctant to consider nominees who do not have broad support.

These issues came to a head in 2005 when Senate Majority Leader, Bill Frist (R-Tennessee) attempted to eliminate filibusters of judicial nominees through an approach that became known as the “the nuclear option” (Klotz 2004; Wawro and Schickler 2007; Koger 2010). Under this approach, a simple majority of the Senate would seek through parliamentary appeals to establish the precedent that filibusters against nominations were unconstitutional (see Wawro, Chapter 4, this volume).  

Such procedural roadblocks lead presidents to anticipate objections from home state and other pivotal senators in making appointments. In the past, federal judgeships rarely elicited the interest of senators outside the nominee’s home state, so the views of the home state senators from the president’s party were typically sufficient to determine whether or not nominees would be confirmed. Other senators would typically defer to the views of the home state senator from the president’s party, thus establishing the norm of senatorial courtesy. Moreover, the Senate Judiciary Committee in the early twentieth century established the “blue slip,” a process in which the views of home state senators—regardless of whether they hailed from the president’s party—were solicited before the committee passed judgment on the nominees (Binder and Maltzman 2004; Binder and Maltzman 2009). By granting home state senators a role in the confirmation process, individual senators could threaten to block a nominee during confirmation and thus encourage the president to consider senators’ views before making appointments. In other words, the blue slip and senatorial courtesy provided individual senators with some leverage over the president.

Third, the Senate rarely considers nominations that lack the support of the Senate Judiciary Committee. For example, Orrin Hatch (R-UT) used his leverage as chair of the Judiciary panel to force President Bill Clinton to nominate Hatch’s friend Ted Stewart to a Utah district court seat. Although Clinton was reluctant to nominate Stewart because of his perceived anti-environmental record as the head of Utah’s

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6 The approach was dubbed the nuclear option because of the anticipated consequences if the attempt were to succeed: Democrats would exploit their remaining procedural advantages and shut down most Senate business. Frist was forced to abandon adoption of this tactic when a bipartisan coalition refused to support such a procedure.
Department of Natural Resources during the 1980s, Hatch held as hostage forty-two other judicial nominations until Clinton made the nomination (Ring 2004).

Fourth, divided party control of the Senate and White House also limits the president’s ability to stack the judiciary as he sees fit. In such periods, the opposition party controlling the Senate is unwilling to give the president much leeway to reshape the federal bench. Instead, the opposition will allow home-state senators and the Judiciary Committee chair to block nominees they oppose (Binder and Maltzman 2002, 2004, 2009).

Likewise, the fact that the Senate calendar is set by the majority party empowers those opposing the president during periods of divided government (Binder and Maltzman 2002, 2004, 2009). During periods when the Senate is controlled by the president’s party, the Senate is more likely to ignore the will of home-state Senators and Judiciary Committee chairs are more likely to envision their role as one of shepherding through presidential nominations.

Ideological and partisan considerations clearly play a role in what is an increasingly congressionally dominated process. Although some have argued that the confirmation process has not changed (Epstein and Segal 2005), numerous scholars have suggested that at all levels the Senate has played a more aggressive role in the nomination process. Likewise, whereas at one time the Senate’s treatment was determined exclusively by its Judiciary Committee and home state senators, the role of the Court in the policymaking process has led to more widespread senatorial involvement in both the confirmation and nomination process (Goldman 1997; Binder and Maltzman 2009; Nemachek 2008).

Although members of Congress have always been involved in attempting to shape the federal judiciary in their home-state, in recent years the nature of the legislative involvement has changed. Whereas at one time, senatorial courtesy was largely a vehicle for ensuring judgeship pork, the fact that the judiciary has begun to play a more active policy making role has changed the nature of congressional involvement. In recent years, it has not been uncommon for a senator to attempt to block the confirmation of a judicial nominee who resides in a different state. The widespread congressional involvement stems in large part from the more prominent role the judiciary plays in the policy making process (Binder and Maltzman 2009).

Even though it is clear that the capacity of the President to utilize their nomination powers to shape judicial outcomes is constrained by Congress, it is also clear that within the Senate there are numerous potential pivots who have the capacity to exercise the veto (Primo, Binder, and Maltzman 2008). The ability of individual members to block Senate consideration of nominees that do not have the support of a super-majority, the Judiciary Committee’s use of the blue slip, the Judiciary Committee’s role in getting nominations to the floor, and the majority party’s role in setting the Senate’s calendar all create veto players who can block a nominee.

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7 Similarly, Shipan (2008) demonstrates that the increasing divisiveness of Supreme Court confirmations stems at least in part from the growing partisanship and increased polarization in Congress.

8 For a similar discussion focused on Supreme Court nominations, see Rohde and Shepsle 2007.
Isolating a single senator or senate institution as being determinative is complicated because of three facts. First, the preferred nominee of a senator and of the President is going to inevitably be shaped by the status quo of each Court. If a Court is more conservative than a particular Senator prefers, the senator might support a nominee who was more liberal than the senator’s preferred outcome. Given the court as a collegial body with multiple members, a senator might strategically prefer a more extreme nominee so as to produce an outcome near his or her true preferred point. Second, measurement of both nominees and the status quo has been imprecise. Third, frequently the exercise of a veto by a pivotal player is observationally equivalent to the veto expressed by a different pivotal player (Primo, Binder, and Maltzman 2008). If a nominee is not confirmed, this could be a result of opposition by any one of numerous pivotal players. All of these factors discouraged intensive analytical study of confirmation politics until relatively recently.

Recent work has used length-to-confirmation data to assess what conditions facilitate confirmation of judges (Binder and Maltzman 2002, 2009; Martinek, Kemper, and VanWinkle 2002; Shipan and Shannon 2003; Nixon and Goss 2001; Scherer, Bartels, and Steigerwalt 2008). These studies make clear that the time needed to confirm a nominee depends upon partisan and institutional forces. In particular, the confirmation process itself takes longer when the president’s party does not control the Senate, when the Senate Judiciary Committee and the president have distinct policy preferences, and in the case of lower federal courts when home-state senators oppose the nominee. They also show that when a seat on the bench is most likely to affect the ideological balance of a court, the confirmation process is more contentious (see Binder and Maltzman 2009; Moraski and Shipan 1999; Lemieux and Stewart 1988; Ruckman 1993).

**The Senate and Supreme Court confirmations**

The Supreme Court nomination and confirmation process is even more politicized. Having politicized nominations is not novel (Abraham 1999; Maltese 1995; Yalof 1999), but the current period is likely among the most politicized. Most point to the Bork nomination as a point-of-no-return as interest groups learned to enter the debate with full force and now feel that cannot do otherwise lest the other side dominate the story.

Political scientists have developed a set of tools to structure how we think about the influence of the Senate on Court nominations. Moraski and Shipan (1999) develop a model in which the president moves first to choose a nominee with a known ideal point in one-dimensional liberal—conservative space. The Senate then decides whether to accept or reject the nominee. The model provides different predictions for nominees for three distinct configurations of presidential and Senate preferences relative to the status quo or reversion point, which is defined as the median of the returning eight-person court. There is *deadlock* when the president and Senate want to move policy in opposite directions. In this case the predicted outcome is a nominee with an ideology at the status quo. The president is *unconstrained* when the president is closer to the status quo than the Senate, or when the Senate is closer.
to the status quo but even closer to the president. In these situations, the predicted nominee ideology is the same as the president’s ideal point. The president is partially constrained when the president and Senate want to move policy in the same direction, but the Senate is closer to the status quo than to the president. In this case, the Senate’s indifference point is the predicted outcome.

The Moraski and Shipan model helps us understand many aspects of the nomination process. One is that not all nominations are equally contentious. The Senate confirmed Justice Scalia with no votes against and a year later Robert Bork, a nominee with similar background and views as Scalia, was blocked in an epochal battle. What account for the difference? Scalia was (effectively) replacing Chief Justice Burger (as Justice Rehnquist was moved to Chief Justice and Scalia took the open seat), a conservative justice. In the Moraski and Shipan model, we see that replacing a conservative with a conservative would have no impact and liberals would have little to gain by blocking Scalia. Bork, however, was nominated to replace a moderate, Justice Powell; replacing him with a conservative would move the median decisively, giving liberals strong reason to block Bork.

At the same time, the Moraski and Shipan model omits several factors that enter into the confirmation process. For starters, there is uncertainty about what any given nominee will do once on the court. For example, President Truman noted “packing the court simply can’t be done . . . I’ve tried and it won’t work . . . Whenever you put a man on the Supreme Court, he ceases to be your friend” (quoted in Tribe 1985, 51; for additional examples, see Segal, Timpone, and Howard 2000, 559). Bailey and Chang (2003) argue that this uncertainty gives presidents incentives to nominate more extreme individuals to the court, which in part may contribute to periods of polarization within the Court. Furthermore, actors other than the president, Senate median, and Court median may influence the process. As Johnson and Roberts (2005) have argued, for example, the filibuster pivot may play an important role (see also Rohde and Shepsle 2007). The previous median on the Court, rather than the median of the Court during a vacancy, might provide a more appropriate baseline (Krehbiel 2007; Zigerell 2010). The ideology of the departing justice may influence confirmation votes (Zigerell 2010), as may public opinion (Kastellec, Lax, and Phillips 2010). And both ideology and partisanship seem to be increasing in importance in recent years (Epstein et al. 2006; Shipan 2008). These and other studies provide numerous suggestions of the ways in which additional political factors can influence both the nomination and the confirmation process.

**JUDICIAL ANTICIPATION OF CONGRESSIONAL REVIEW**

It is also possible that Congress may be able to influence judicial decision-making in an ongoing manner. Judges may be so worried about congressional retaliation
that they are reluctant to pursue policies that are unacceptable to elected officials. This view suggests that justices are constrained because the Court is embedded in a separation-of-powers game (Murphy 1964; Eskridge 1991; Ferejohn and Shipan 1990; Ferejohn and Weingast 1992; Ferejohn 1999; Gely and Spiller 1990; Spiller and Gely 1992; Eskridge, Ferejohn, and Gandhi 2002).\(^9\) Rather than viewing justices as independent, separation-of-powers models suggest that the "Supreme Court will anticipate the reactions of Congress and craft its statutory interpretation decisions so that they will not be overturned" (Bawn and Shipan 1997, 1–2). According to Baum, when Justices understand that their interpretation would provoke a congressional override, justices modify their interpretations to avoid that result. By making implicit this compromise with Congress, the justices could get the possible result under the circumstances: not the interpretation of a statute that they favor most, but one that is closer to their preferences than the new statute that Congress would enact to override the Court’s decision. (Baum 2007, 147).

Baum’s view is consistent with Murphy’s claim that justices pursue a “broad range of strategic or at least tactical advantages” in “situation[s] in which [their] objections would be threatened by programs currently being considered seriously in the legislative or executive branches of government” (Murphy 1964, 156).

Separation-of-powers models contradict Segal and Spaeth’s attitudinal model that has figured extremely prominently in the Court literature (Maltzman, Spriggs, and Wahlbeck 1999; Brenner and Whitmeyer 2009). Whereas the attitudinal model is based upon the premise that constitutional safeguards such as lifetime appointments and a guaranteed salary enable judges to pursue their personal policy preferences, separation-of-powers models are based upon the assumptions that judges realize the limits of the constitutional protections.

Separation-of-powers models are built on two pillars. One pillar is the notion that justices fear the sanctions that the elected branches can impose on the Court and its justices. Elected branches can overturn the Court’s rulings through statutory revisions or constitutional amendment, and they can sanction the Court by engaging in “Court-curbing” actions, such as curtailing its jurisdiction, limiting its budget, manipulating the size of the bench, or even impeaching justices (Murphy 1964; Cross and Nelson 2001; Rosenberg 1991; Toma 1991; McNollgast 1995; Friedman 1990, 1998; Ferejohn 1999; Peretti 1999; Epstein, Knight, and Martin 2004; Barnes 2004; Clark 2009).

The other pillar is the notion of anticipated reaction. According to this view, fear of potential sanctions induces justices to take into account legislative and executive preferences when making their decisions. Justices, like all strategic actors, are forward-looking individuals who base their decisions in part upon expectations about how others will respond to their choices. As a result, the rarity of formal sanctions is not seen as an indication that the Court has no need to fear the elected branches. As

\(^9\) Ironically, the separation-of-powers model is rooted in the notion of checks and balances, rather than the separation of powers.
Paretti explains, “The ‘rule of anticipated reactions’ is the typical manner in which political checks operate” (1999, 145).10

Figure 36.1 presents the logic of separation of powers models (Epstein and Knight 1998; Gely and Spiller 1990; Ferejohn and Shipan 1990). In the basic version of these models, actors have preferences that fall on a single dimension with the Court, House and Senate each represented by their median member. The Court (SC) in this example is outside of the elected branch “Pareto set” defined by the preferences of the House (H), Senate (S) and President (P).11 If the Court were to rule in a manner that set policy at their ideal point, SC, all three elected players would be united in wanting to push policy to the left. If it were a statutory case, Congress and the President could simply pass legislation that would produce a policy at some other point.12 In the figure, the location is at (a), a point relatively far from the desired policy of the Supreme Court median. Hence, a strategic Court selects the equilibrium outcome. In the Figure, this is at the Senate's most preferred point. The exact location of the resulting policy would depend on the location of the status quo and the relative power of the elected branches, but it could be quite far from the Court’s preferred policy. Thus, the strategic court identifies.

Skeptics of separation-of-powers models have raised questions about both pillars. In particular, they have argued that the Court has little ability to anticipate congressional reaction and little to fear from Congress (Segal 1997; Segal and Spaeth

10 Although separation-of-powers models are based upon the notion that justices defer to Congress out of fear of congressional response, justices might also defer because of the value that they place on judicial restraint. Bailey and Maltzman (2010) demonstrate that legal doctrines are a constraint on Supreme Court decision-making.

11 While Figure 36.1 is a simple version of the separation-of-powers model, more sophisticated versions take in legislative and constitutional features that empower specific members. For example, rather than assuming the Senate and House medians and the President define the Pareto set, one could alter the model by recognizing the pivotal role of those Senators whose support is needed to invoke cloture. Alternatively, one could take into account members of Congress who hold key leadership or committee positions. To simplify the presentation, we highlight the role of the median senator.

12 If it were a constitutional case, elected officials could either punish the judiciary or if a super majority of the House and Senate disagreed with the Court, they could begin the process of amending the Constitution.
Therefore, they argue that the Court has no reason to allow congressional preferences to structure its decision-making. According to skeptics of the separation-of-powers models, judicial independence is protected because there are so many pivotal players (see note 7) that the set of Pareto optimal outcomes is likely to encompass the median justice (Krehbiel 1998; Ferejohn and Shipan 1990; Tsebelis 2002). Judicial independence is further protected because building a winning coalition to overturn the Court is deemed to be too costly.

The costs that Congress incurs in overriding the court can take several forms (Segal and Spaeth 2002, 207). One cost is derived from the regular and frequent interactions between Congress and the Court. As Segal (1997) has put it, the assumption that Congress has “last licks” is simply false. If Congress attempts to sanction or override the Court, it has no idea if the Court will back down or if the Court will “go nuclear” via judicial review. A second cost stems from the idea that a large (albeit not necessarily a majority) of the public values the concept of judicial independence. Given legislators’ uncertainty about the public’s views about judicial independence and about when the elected branches should intervene, members of Congress who might challenge court decisions may be uncertain about whether such intervention will cost them at the polls. Likewise, many members of Congress understand the inherent risks associated with infringing upon judicial independence. If Congress does overturn the Court on a routine basis, future winning coalitions with different policy priorities may feel entitled to use the Court as a vehicle for undermining previously-enacted programs and policies. Such a dynamic would clearly limit legislators’ abilities to lock-in policies over time.

Perhaps the most important costs pertain to the transaction costs associated with building a winning legislative coalition. These costs can be significant and can hinder Congress’s capacity to curtail the court (Segal 1997). As Segal has noted, “even if the committee-gatekeeping or party-caucus model is a more accurate representation of the lawmaking process, and justices are often outside the set of Pareto optimals, sincere voting by justices may still be rational if there are high opportunity and/or transaction costs to passing legislation…” (1997, 42).

Even if Congress could efficiently overturn the Court and if the Court realized when this was likely, the extent of the constraint is limited by the fact that the Supreme Court is usually within the Pareto set of the elected branches. This is particularly true if one characterizes the legislative process as involving numerous pivotal actors...
who effectively possess the ability to block legislative action. These would include chamber medians, committee chairs and medians and, in the case of the Senate, filibuster pivots (see, for example, Brady and Volden 1998; Krebiehl 1998; Ferejohn and Shipan 1990; Tsebelis 2002). Not surprisingly, studies of Congressional overrides of Supreme Court decisions suggest a weak relationship between the ideological congruence of the Court and Congress and congressional overrides (Hettinger and Zorn 2005). This suggests that preference based models should not hold a monopoly in explaining the relationship between the courts and Congress (Ignagni, Meernik, and King 1998).

Empirical analysis of separation of powers models comes in two forms. The first is from case studies of instances in which the Supreme Court appeared to respond to political pressure, cases that include Marbury v. Madison (Knight and Epstein 1996; O’Brien 2000), Ex parte Milligan (Epstein and Knight 1998), and West Coast Hotel Co. v. Parrish (Leuchtenburg 1995; Oren 1995; Carson and Kleinerman 2002; see White 2005). The last case is famously known as the “switch in time that saved nine” as the change of heart by the Court that led it to be more permissive toward Roosevelt’s New Deal agenda may well have saved the court from Roosevelt’s court-packing plan. Rosenberg (1992) examines periods of congressional hostility toward the Court and found that in six of nine periods the Court clearly moved in the direction desired by Congress.

The second type of empirical analysis has been quantitative. Here there have been two waves of research. The early wave put the theory to test using the measurement tools available at that time. While Spiller and Tiller (1992) found evidence consistent with congressional constraint on the court, Segal (1997) found none. Segal examined the voting record of each justice on an annual basis between 1947–1992 and assessed whether justices’ voting on statutory civil liberties changed when their preferences fell outside a range that would be acceptable to pivotal players within Congress. One of the challenges is we need to know something about justices’ actual preferences and then we need to compare them against observed behavior. Since we typically use observed behavior to infer preferences, this presents a bit of a quandary. Segal’s key insight was to use judicial behavior on constitutional cases to measures of “true” (unconstrained) preferences and judicial behavior on statutory cases to measure possible constrained behavior. The limitation of this approach, of course, is that it assumes separation of powers theory only applies to statutory cases, something contested by many scholars (Harvey and Friedman 2006, 2009; Meernick and Ignagni 1997; Murphy 1964).

One of the limitations of this generation of work was that the preference measurement technology had not caught up to the demands of separation of powers theory. The theory unqualifiedly requires inferences about preference differences across institutions; however, the state of measurement at the time offered no statisti-

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15 A related point is that, as Spriggs and Sala demonstrate, empirical work needs to be tied more closely to the underlying theoretical models.
cally defensible way to calibrate preferences across institutions, a fact well-appreciated by scholars involved in the literature (see, e.g., Segal 1997, 36).16 Bailey (2007) provided an approach that yielded preferences that were comparable across institutions. Building on Bailey and Chang (2001), he incorporated an extensive and substantially original data set of observations of presidents and members of Congress taking positions on Supreme Court cases. That is, by including, for example, Senators taking positions on Supreme Court cases via amicus briefs and statements on the floor, the differences across institutions could be pinned down.

The next generation of the literature used such improved preference measures to re-evaluate separation of powers theory. Bailey and Maltzman (2010) conducted two tests. First, following Segal (1997) they assessed whether justices were constrained on statutory cases. Inter-institutional preferences based only on constitutional cases were used to generate “true” preferences needed to assess whether the Court was in or out of the political Pareto set. Their approach also was able to build on techniques from Bailey and Maltzman (2008) so as to control for individual justice level differences in how they value precedent, deference to Congress and free speech rights. They found that twelve of the twenty-five justices from 1950 to 2008 for whom adequate data existed were significantly more likely to be more conservative when the political Pareto set was conservative and vice versa. These justices spanned the ideology spectrum from Warren, Brennan, Fortas, Douglas, Stevens, on the left to Souter, Stewart, Powell, O’Connor in the middle and Kennedy, Scalia and Thomas on the right.

But since many believe that the ability of Congress to retaliate against the Court and its justices for its constitutional decisions could also lead to separation of powers constraints applying on constitutional cases. In this instance, the Segal approach to identifying the constraints will not work. Bailey and Maltzman (2010) therefore looked at all instances of major election shifts, which could lead to a change in the political Pareto set. If justices were constrained, they should become more liberal after a Democratic victory as either a conservative constraint is removed or a liberal constraint is imposed; justices should become more conservative after a Republican victory as either a liberal constraint is removed or a conservative constraint is imposed. But since justices could move in the direction of an election victory due to general changes in political views, Bailey and Maltzman look for justices to move relative to members of Congress. That is, they look for justices to shift not only to the right after Republicans win the presidency, but to jump over some Republican members of Congress. For example, before the 1980 election, Justice Rehnquist was to the left of Senator Stennis; after the election, which undid a liberal political constraint on the court, Rehnquist was to the right of Senator Stennis.

16 Other concerns centered on the use of Segal–Cover scores that are fixed for each justice across their entire career. Considerable evidence exists that justices’ preferences vary over time (Bailey 2007). In addition, assessing cross-time variation is difficult; Bailey (2007) shows that the widely used Martin and Quinn (2002) scores imply that the Court median was as conservative in 1973 when it decided Roe as it was in the heyday of the Rehnquist Court. By using cross-time bridging observations, Bailey (2007) develops scores that do not exhibit such anomalies.
Across six major shifts in the political Pareto set associated with changes in presidency, justices moved significantly in the expected direction more often than not. In some cases the pattern was extremely strong, such as 1980 when all justices moved in the expected direction. And, the movement was as strong or stronger on salient cases, which would be expected given separation of powers theory and the critiques of it with regard to congressional interest and capacity to act.

The literature has also dealt in a sophisticated manner with other inferential challenges. One is agenda-bias. If Justices are smart, they should shy away from taking on cases on which they should be constrained. Hence, we may not even “see” the cases on which constraint is strongest. Therefore Harvey and Friedman (2006) focus on laws passed by Congress and assess whether the Court is more likely to overturn a given law if the Court is inside or outside the Pareto set central to the separation of powers theory. They find that laws enacted by Congress between 1987 and 2000 were significantly more likely to be declared unconstitutional and argue that this was related to the degree of constraint imposed on the Court by Congress on Constitutional cases. Harvey and Friedman (2009) followed up to show that the Court’s docket is less likely to include cases where there are large deviations between what the Court would like to do, and what separation of powers theory predicts it can do in its final rulings.

Not only may justices be forced to do what Congress wants by political reality, they sometimes try to push things back on Congress. Hausegger and Baum (1999) show that seven percent of majority decisions by the Supreme Court have some kind of invitation to Congress to re-legislate on some point. Such invitations take the form of majority opinion language suggesting a congressional override in the form of a statutory clarification (Hausegger and Baum 1999). This behavior implies that the Court feels some constraints such that it would rather Congress dealt with a policy. It also points to an ongoing interactive relationship consistent with the coordinate construction literature we began by discussing.

Scholars, like members of Congress, federal judges and those who authored the United States Constitution, understand that it is possible for the judiciary to shape policy outcomes and for Congress to infringe upon judicial independence. But how these understandings translate into political behavior is murky at best. This murkiness stems from three central causes. First, the relationship has evolved over time. Second, the relationship is multifaceted. It involves questions of how judges make

17 Although the find has a statistically significant effect, it is worth noting that the substantive effect is small.
decisions, legislators debate and write statutes, and even confirmation politics. Third, empirical analysis has been constrained by inferential challenges ranging from difficulty of working with complex theories to lack of data to lack of appropriate measures. Political scientists have made considerable progress in dealing with these challenges and can now identify with more confidence several aspects of the interaction between the courts and Congress.

However, all is not known and three other factors may make it difficult to fully understand the relationship between Congress and the courts. First, relationships are highly contextual and diverse. This is always true in any political system, but even more true with regard to the Court where life-tenure and other institutional safeguards give actors more latitude to act independently. Such independence can lead to autonomy and rejection of inappropriate political interference (as was the intent), but it can also lead to simple idiosyncrasy. Bailey and Maltzman (2010) show substantial evidence of heterogeneity across justices in whether they are bound by legal factors and, if so, which ones. They also show that not all justices are equally influenced by Congress; political prudence is not a trait that is served in equal portions to all justices.

A second, and related, point is that both Congress and the Supreme Court are collegial bodies made up multiple members and employ procedures that do not consistently empower any particular member. Committees, party leaders, filibuster pivots, chamber medians, opinion authors, the Chief Justice, and the bench median all have power in particular instances. Likewise, the judiciary is made up of judges who occupy different levels of Court and who approach their responsibilities differently, and Congress is made up of both members of the House and Senate. Although many of the theoretical models exploring the relationship between the courts and Congress portray the institutions as unitary actors neither institution really fits this bill.

Third, efforts to understand the relationship that exists between Congress and the courts need to recognize that a bi-institution portrait is underspecified. Understanding how Congress responds to the judiciary can only be done while taking into account the relationships that exist between Congress, the courts, other government entities (such as the bureaucracy), and non-government actors. Looking at the relationship between Congress and the courts in isolation misses an important part of the story. For example, elected officials may resist overturning a court decision to avoid an unfavorable public response. Such a possibility is a reasonable concern since the courts are typically viewed favorably by the American public and congressional intervention is frequently unpopular. As a result, politicians may be reluctant to incur the electoral costs associated with overturning the Court. Likewise, looking at the relationship between Congress and the courts without considering the distribution of power within Congress might also miss a key part of the story. For example, the courts have the capacity to ensure compliance with the law and to be a healthy check on a federal agency. The value of this check might depend upon both the preferences of the agency and the executive and on the relationship between the committee that oversees the agency and Congress as a whole.
Almost thirty years ago, Gibson (1983) made a plea to be more sensitive to the microlevel links between the Court and the broader political environment. Rather than testing separation of powers by examining the court as a whole, Gibson made a case for studying the decisions of individual justices. Rather than ignoring environmental constraints, Gibson called for an approach that recognized that individuals make decisions “within the context of group, institutional, and environmental constraints.” Claims that the Court as a whole is either constrained by Congress or is purely independent potentially miss substantial and systematic justice-level and case-level variation in judicial outcomes. The bottom line is that inter-branch relations are complicated, and it is this complication that provides scholars both the greatest challenge and the greatest opportunity.

References


