

AN ALTERNATIVE PERSPECTIVE ON SUPREME COURT AGENDA SETTING IN A SYSTEM OF SHARED POWERS*

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This study builds on existing empirical separation-of-powers work to determine whether legislative and executive preferences constrain the Supreme Court's agenda. Its contribution comes in the form of a different modeling perspective—namely, whether judicial improvements over the status quo might avoid legislative overrides. The location of the status quo vis-à-vis key pivots does not appear to factor in to the Court's agenda calculations. Regardless of whether the Court was improving the status quo policy or making it worse for Congress and the president, the Court does not appear to consider legislative overrides.

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

Do justices strategically avoid hearing cases that they anticipate will alter the status quo in a way that makes pivotal members of Congress and the executive worse off? According to strategic-separation-of-powers theory, the political branches possess various tools to rein in wayward Courts. As a result, the argument goes, justices will be loathe to deviate from majoritarian preferences, for violating the dominant political will could impugn the Court's legitimacy and provoke damaging repercussions (Mondak, 1994; Epstein and Knight, 1998).

Attempts to test this theory *empirically*, however, have run into trouble. Many studies (Sala and Spriggs, 2004; Spriggs and Hansford, 2001; Segal, 1997) find no evidence of a separation-of-powers influence. Of course, many of these studies focus on the Supreme Court's merits decisions, which is potentially problematic since the Supreme Court sets its own agenda—and does so in private, without any need to justify its decisions publicly (Owens, 2010). Accordingly, the Court might decline to review cases likely to engender hostility from the political branches (Harvey and Friedman, 2009).

To examine whether the Court plays the separation-of-powers game when setting its agenda, I use archival records harvested from the Library of Congress and justices' personal papers to analyze 430 petitions for review and appeals filed with the

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Court between its 1953 and 1993 terms. More important, however, and in contrast to other work on separation-of-powers agenda setting, I examine how the Court's shift of the status quo policy influences legislative responses and, accordingly, whether the Court reviews a case. That is, I examine whether the Court is more or less likely to take a case if the policy it makes will improve on the status quo or make it worse for the legislative pivots. In what follows, then, I take a different tack, and examine strategic separation-of-powers agenda setting as a function of judicial preferences, the location of the status quo, and whether the Court's expected decision will improve policy for Congress and the president.

THE SUPREME COURT'S AGENDA-SETTING PROCESS

When a party in a lower court loses a dispute and wants the Supreme Court to review the case, the party files a petition for a writ of certiorari ("cert") or an appeal with the United States Supreme Court clerk. The Court meets in private conference roughly once every two weeks to vote on which cases it will hear. If four or more justices vote to grant review, the case proceeds to the merits stage. Cert votes are entirely discretionary and, unless divulged by the personal papers of a former justice, are completely secret (Black and Owens, 2009, Stern et al., 2002).

For a host of reasons, the agenda stage may be the best place to determine whether the Court bows to pressure from the political branches (Owens, 2010). For starters, the Court has nearly complete discretion to determine which cases it will hear. There are very few formal requirements forcing justices to hear a case. The Court could thus exercise restraint by avoiding a case without fear of violating a formal rule of review. Relatedly, justices make their agenda decisions in complete privacy. When voting to hear cases, only the justices themselves are allowed in the conference room, thereby removing any fear of looking cowardly or "non-judicial" to the general public. Indeed, a critical difference between the Court's agenda decisions and its merits decisions is that agenda decisions alone need not be accompanied by a rationale. Thus, justices could back down from Congress and the president but do so silently and without having to notify the public of its passivity.

Whether justices play the separation-of-powers game, of course, is an open question. A handful of interesting studies suggest that justices may pay attention to legislative preferences. Harvey and Friedman (2006), for example, observe all statutes enacted between 1987 and 2000 to determine whether the Court struck them down. Their theory is that the Court would be less likely to strike down legislation if it anticipated legislative rebuke. After the 1994 Republican Revolution shifted legislative preferences and situated the Court between the president on the left and Congress on the right, the Court appeared to strike federal laws with increased proclivity. Hansford and Damore (2000) similarly find that at least some justices moderate their votes in the face of legislative hostility. Spiller and Gely (1992) find that the Court renders more

pro-labor decisions as Congress becomes increasingly liberal.¹ Still, for every study that finds a separation-of-powers effect at the merits stage, another finds the opposite (Owens, 2010; Segal, 1997; Segal and Westerland, 2005; Sala and Spriggs, 2004; Spriggs and Hansford, 2001).

Because the Court may act strategically one stage earlier—during the agenda-setting stage—these findings do not conclusively answer whether justices play the separation-of-powers game (Owens, 2010; Harvey and Friedman, 2009). Examining whether the separation of powers influences the Court's agenda may address the question more directly. Only three studies have examined whether legislative and executive preferences influence the Court's agenda decisions. Epstein, Segal, and Victor (2002) argue that the Court declines to review statutory interpretation cases when faced with a hostile Congress. Still, the study uses ADA scores—which do not scale with judicial preferences—to measure congressional preferences and focuses only on cases the Court decided to hear, leading to questions of selection bias. Harvey and Friedman (2009) find that the Court avoids politically problematic cases when setting its agenda. Yet, it fails to control for variables known to be associated with agenda setting, such as circuit conflict or amici involvement. Owens (2010) examines whether justices are less likely to review cases when they expect the Court's decisions will fall outside the legislative equilibrium. Perhaps more important, however, the study does not distinguish between those cases that improve the status quo or make worse policy for the political actors. That is, the study, like many before it, assumes that anytime the Court renders a policy falling outside the legislative equilibrium, Congress and the president will override it.

There are reasons to believe that such a modeling strategy masks separation-of-powers influence. Congress frequently allows status quo policies to survive that fall outside the legislative equilibrium. One study, for example, examined legislative responses to the minimum-wage issue and found “despite status quos that are estimated to be more conservative than the most conservative pivot according to [standard lawmaking models] . . . policy change often does not occur (Clinton, 2007:17). Just why such policies survive despite their theoretical problems is unclear. Certainly, transaction costs may matter. But it is also possible that Congress and the president are politically unable to address them. Whatever the reason, the Court might assume that Congress and the president are unlikely to override their decisions when they *improve* the status quo, even if they do not fall within a theoretical boundary of Congress's sincerest preferences. If so, existing modeling strategies may be too stringent—they may be asking too much in the form of a legislative response (Hansford and Damore, 2000)—and therefore fail to capture separation-of-powers realities. The approach I take here, then, is to relax the assumption of an automatic override when the Court

¹ Clark (2009) examines Court-curbing measures in Congress to examine whether the Supreme Court strikes fewer laws when Congress appears ready to stand against it. His results suggest that the Court pulls back when facing resistance from Congress.

sets policy outside the legislative equilibrium and, instead, examine whether the Court plays the separation-of-powers game by analyzing how its treatment of the status quo policy will impact the elected branches.

EXPLAINING STRATEGIC-SEPARATION-OF-POWERS AGENDA SETTING

According to the strategic-separation-of-powers model, justices seek to further their policy preferences but are constrained from acting sincerely on those preferences by their judicial colleagues, Congress, and the president. That is, justices must pursue their goals in an environment in which their choices turn on the preferences and likely reactions of their colleagues (see, e.g., Maltzman, Spriggs, and Wahlbeck, 2000) and the political branches (Epstein and Knight, 1998; Rosenberg, 1991).²

The Court will buckle under congressional and executive preferences because the political branches have the constitutional authority to punish the Court and pass legislation that alters its policies (Epstein, Knight, and Martin, 2001). Congress can pass override legislation, support constitutional amendments to overturn constitutional decisions, reduce the Court's budget, alter its composition, strip it of jurisdiction, regulate Court procedure, hold judicial salaries constant, and impeach justices (George and Epstein, 1992). Presidents can sign or veto override legislation, refuse to enforce the Court's decisions, mobilize interest groups to attack and undermine Court decisions (Peterson, 1992), and use the bully pulpit to focus public scrutiny on judicial decisions. The combination of these powers, the argument goes, will force the Court to anticipate how Congress and the president will respond to its decisions and make policy in compliance with majoritarian preferences (Spiller and Gely, 1992; Bergara, Richman, and Spiller, 2003; Harvey and Friedman, 2006; Epstein and Knight, 1998). If the Court perceives that by voting for its most preferred alternative it will create policy out-of-step with key policymakers, it will moderate its decision so as to make policy that is more favorable to them. Influence from the elected branches, then, forces the Court into majoritarian compliance.

Relying on this theory, I model the conditions under which the Court might grant or deny review to cases due to a separation-of-powers constraint. Two conditions must be met before the political branches can constrain the Court. First, the Court median must have an ideal point outside the legislative equilibrium—the policy space in which there are no alternative points that make all legislative actors at least as well off (Harvey and Friedman, 2006). Second, as briefly discussed above, the Court's decision must make at least one legislative pivot worse off than the existing status quo.³ When these two conditions are met, the Court theoretically is constrained and, if strategic-separation-of-powers theory is correct, it will deny review to the case.

² It is worth pointing out that not all advocates of the strategic model support the strategic-separation-of-powers model. The separation-of-powers version is simply one version of the strategic model (Owens, 2010).

³ Again, I assume that Congress and the president will not override judicial decisions that are improvements over the status quo. To be sure, most studies take a stricter approach and expect overrides anytime the Court sets policy outside the legislative equilibrium (Spiller and Gely, 1992; Bergara, Richman, and Spiller, 2003; Sala and Spriggs, 2004; Owens, 2010). I do not take issue with these studies and their modeling assumptions but merely seek evidence of a separation-of-powers influence from a different perspective.

To expound on this theory, I employ standard spatial models. The models make the following assumptions: All actors have continuous, single-peaked, symmetric preferences on a unidimensional policy scale and prefer policy that is closest to their ideal points (Sala and Spriggs, 2004). There exists a status quo that can be measured on the same unidimensional scale. All actors know each others' preferences and the policy location of the status quo (Harvey and Friedman, 2006). Since the actors' preferences are categorized fully by the model, they will choose equilibrium strategies even when their votes are not pivotal (Sala and Spriggs, 2004). Justices expect the Court to set policy at the median justice's ideal point (Martin, Quinn, and Epstein, 2005).⁴ The pivotal legislative actors will pursue override legislation only when the Court changes policy in a manner that is worse for them. And, finally, justices want to avoid legislative overrides (Harvey and Friedman, 2006; Sala and Spriggs, 2004; Bergara, Richman, and Spiller, 2003).⁵

First, for the Court to be constrained by the separation of powers, the median justice must be outside the legislative equilibrium (Harvey and Friedman, 2006). Figure 1 provides a graphical explanation of this requirement. The House, Senate, president, and Supreme Court are all placed along this spectrum. Figure 1A shows a Court that is inside the legislative equilibrium. The Court in this example is more conservative than the House (the Left Pivot) and Senate, but is less conservative than the president (the Right Pivot). Under this configuration, the Court can set policy at its ideal point, *J*, regardless of where the status quo is located. If the House tried to pass override legislation anywhere to the left of *J* the president (and Senate) would block it. Conversely, if the Senate proposed override legislation to the right of *J*, the House would block it.⁶ Figure 1B, on the other hand, represents a situation in which the Court may be constrained because the median justice is outside the legislative equilibrium. Whether the Court is so constrained, however, may depend on the location of the status quo.

Second, the Court's decision must make the key legislative pivots worse off than the status quo. That is, the location of the status quo can force a Court into an unconstrained, semi-constrained, or constrained regime.⁷ Figures 2 and 3 illustrate. *J* represents the median justice's ideal point. *SQ* represents the status quo policy the Court is

⁴ The assumption that the median drives outcomes has theoretical appeal (Martin, Quinn, and Epstein, 2005) and empirical support (Bonneau et al., 2007). To be sure, the median's policy position does not—in practice—always win out (Carrubba et al., 2007). Still, justices have good reason to expect that, on average, the median's position will prevail (Bonneau et al., 2007). As such, using the median justice's revealed preferences at the agenda stage may be a reasonable compromise to allow the theoretical analysis to proceed.

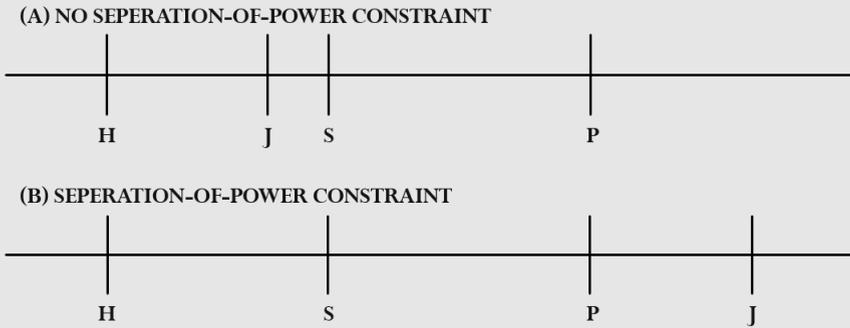
Additionally, while it is true that the Rule of Four only requires four justices to grant review, the model—and others like it (Hammond, Bonneau, and Sheehan, 2005)—assume that justices are forward-looking and will vote to grant review with the merits outcome in mind.

⁵ An interesting line of studies analyzes how justices might enlist the aid of Congress in the pursuit of their goals (Spiller and Tiller, 1996; Hausegger and Baum, 1999).

⁶ The current example ignores the veto override. I test the impact of the veto override below.

⁷ For a well-developed discussion of the concept of "regimes," see Moraski and Shipan (1999) and Richards and Kritzer (2002).

Figure 1
Context and the Separation of Powers



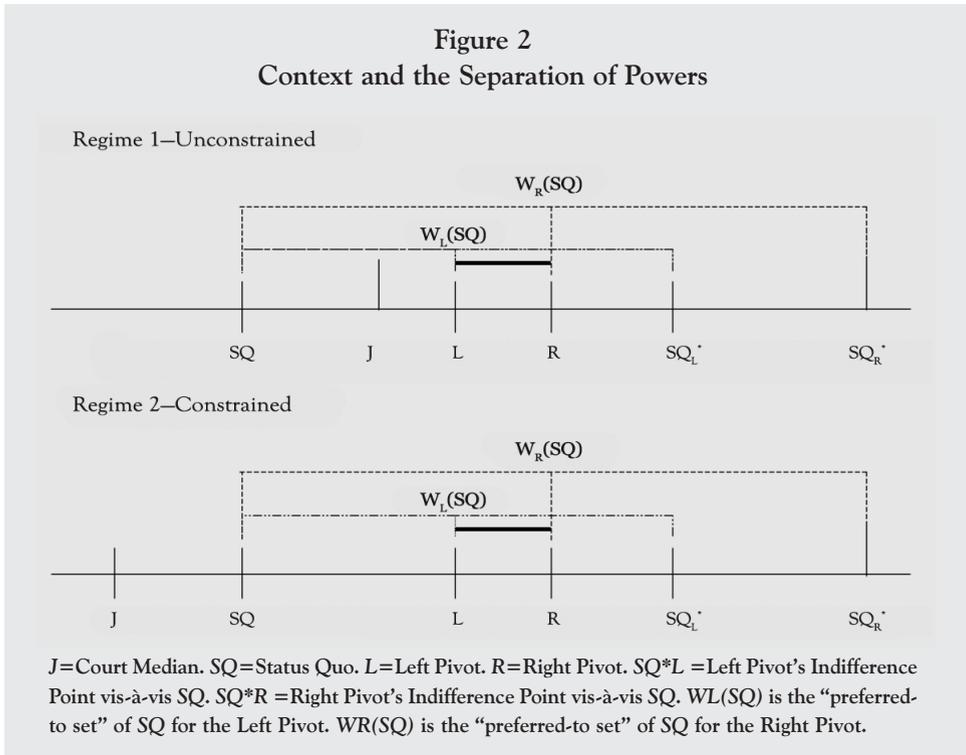
H=House. S=Senate. P=President. J=Supreme Court. In this figure, the House is the Left Pivot and the president is the Right Pivot.

being asked to review. L is the leftmost pivotal member of the legislative process. R is the rightmost legislative pivot. SQ^*L represents the Left Pivot’s indifference point relative to the status quo. That is, it reflects the policy that the Left Pivot enjoys just as much as the status quo. SQ^*R is the Right Pivot’s indifference point relative to the status quo. $WL(SQ)$ is the “preferred-to set” for the Left Pivot—the set of policies that the Left Pivot prefers to SQ (Bonneau et al., 2007). $WR(SQ)$ is the “preferred-to set” for the Right Pivot.

In Regime 1, even though the median justice resides outside the legislative equilibrium, the model asserts that the Court is unconstrained and can, therefore, render a decision at its ideal point. That is, the Court resides within both the Left and Right Pivot’s preferred-to sets relative to SQ . When the Court renders its decision at J , it shifts policy *closer* to both pivots, making them better off than the status quo. The result is an improvement for the key legislative actors. Because the Court can improve policy for itself and the political actors will not respond with override legislation, the Court will grant review.

In Regime 2, the Court is constrained and will decline to review the case. The Court is more liberal than the status quo, which, in turn, is more liberal than the Left and Right Pivots. If the Court granted review to the case and rendered a decision at J , the result would be a net policy loss for both key legislative pivots. Accordingly, those pivotal actors will respond with override legislation. The Court would, therefore, deny review.

Regime 3, found in Figure 3, shows a semi-constrained Court. In this regime, the Court’s ability to set policy is dependent on the pivots’ preferred-to sets. Look, first, at $SQ1$. Assume that the Court is represented by $J1$. In this example, the Court could set

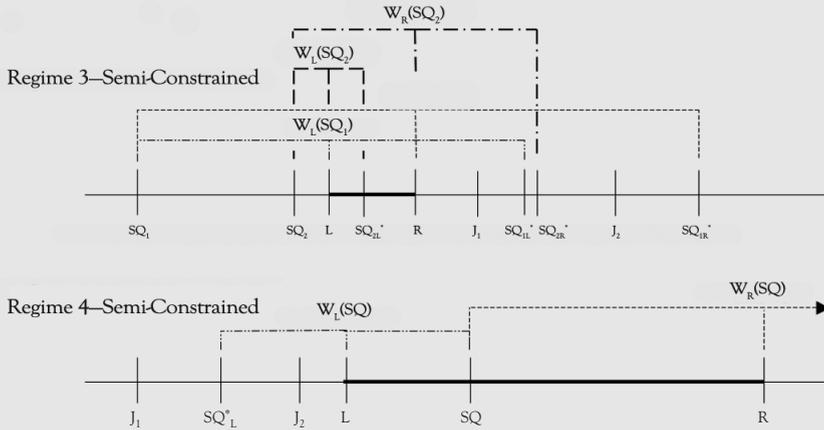


policy at its ideal point because its decision would be an improvement for both legislative pivots. That is, the Court's preferred outcome $J1$ is a large improvement for the Right Pivot, and a smaller improvement for the Left Pivot. As such, according to the model, neither would introduce legislation to override the Court's decision.

Assume, however, that after personnel change, the Court median is represented by $J2$. If the Court tried to set policy at $J2$, its decision would be vulnerable to a legislative override. To be sure, setting policy at $J2$ would make the Right Pivot better off than the status quo policy. Nevertheless, the policy shift would be worse for the Left Pivot. In response, the Left Pivot would propose legislation that makes both it and the Right Pivot better off than $J2$. Anticipating this response, the Court would simply render its decision at SQ^*L1 , the location in policy space that makes the Court better off, R better off, and leaves L no worse off. As such, it would vote to grant review.

Now, assume that the status quo is $SQ2$ rather than $SQ1$ and that the Court median is again $J1$. The Court in this scenario again is semi-constrained. It would be forced to render a decision at R . If the Court rendered a decision at $J1$, it would, of course, improve policy for both it and the Right Pivot. Nevertheless, it would make worse policy for the Left Pivot, who has the power here to offer something better to R . That is, the Left Pivot would strategically propose override legislation that would improve policy for it and for the Right Pivot. To avoid this response, the Court would be forced to render a decision on the merits at R , an outcome that still improves poli-

Figure 3
Context and the Separation of Powers



J =Court Median. SQ =Status Quo. L =Left Pivot. R =Right Pivot. SQ^*L =Left Pivot’s Indifference Point vis-à-vis SQ . SQ^*R =Right Pivot’s Indifference Point vis-à-vis SQ . $W_L(SQ)$ is the “preferred-to set” of SQ for the Left Pivot. $W_R(SQ)$ is the “preferred-to set” of SQ for the Right Pivot.

cy for it. As this is the Right Pivot’s ideal point, nothing L proposes can lead R to move policy away from the Court’s decision. The Court’s policy, then, survives any override attempt. In the end, while the Court cannot set policy at its ideal point (either $J1$ or $J2$), the equilibrium policy it adopts nevertheless will be an improvement over the status quo for the Court. Consequently, it will grant review.

Regime 4 also shows a semi-constrained Court. Look first at a Court whose median is $J1$. If the Court rendered a decision at $J1$, it would make both legislative pivots worse off than the status quo, and they, in turn, would pass override legislation. The Court at $J1$, then, would be forced to render a decision at L , the point on the legislative equilibrium that is closest to it and that avoids an override. L would, of course, block any override attempt by R , which seeks to move policy back to the right.⁸ Once again, while the Court cannot set policy at $J1$, its ultimate decision at L is a net gain for the Court, which, in turn, will lead it to grant review to the case.

Indeed, this dynamic holds even when the Court falls within the Left Pivot’s preferred-to set. Assume that Court personnel changes, and $J2$ becomes the new Court median. The Court still would be forced to render a decision at the Left Pivot’s ideal point. While a decision at $J2$ would be better than the status quo for the Left Pivot, the Right Pivot would be worse off. In response, the Right Pivot would propose override legislation either on or to the right of L , depending on where the Court set its policy. Anticipating this response, the Court would render a decision at L . This is the clos-

⁸ Note that in Regime 4, the Left Pivot benefits from the Court’s decision. Without the Court’s intervention, the status quo would be gridlocked—the pivots could not agree on a policy other than SQ . If, however, the Court gets involved, it could shift policy to the Left Pivot’s ideal point.

est point on the legislative equilibrium that avoids an override. Nevertheless, because the Court can shift policy closer to its ideal point, it will grant review to the case.

Combined, then, these four regimes and the strategic expectations derived from them suggest that if the Court is in an unconstrained or semi-constrained regime, it will grant review to a case; conversely, if the Court is in a constrained regime, it will deny review to a case.

WHO ARE THE LEFT AND RIGHT PIVOTS? THEORIES OF LEGISLATIVE DECISION MAKING

Defining who the pivotal legislative actors are is a complicated task. Scholars advocate equally plausible theories of congressional decision making. As such, I examine each of them.

The Chamber Median model argues that legislative outcomes reflect the preferences of the median legislator in each chamber (Krehbiel 1991, 1995). That is, members of Congress are elected with and vote based on sincerely held preferences over policy outcomes. The median member of each chamber controls legislative outcomes (Lawrence, Maltzman, and Smith, 2006; Kingdon, 1973). Thus, the Left Pivot under the Chamber Median model is the most liberal among the House chamber median, the Senate chamber median, and the president. The Right Pivot is the most conservative among the House chamber median, the Senate chamber median, and the president.

A second model, the Party Gatekeeping model, argues that majority party leaders control congressional procedures so as to dictate (or at least make more likely) certain outcomes—outcomes that majority party leaders will prefer (Cox and McCubbins, 2005). Party leadership will allow legislation to receive an up-or-down vote when it satisfies both the chamber medians and party medians. As Lawrence, Maltzman, and Smith (2006) state: “[T]he majority party manipulates the amendment agenda so as to restrict the chamber median’s ability to move outcomes towards that legislator’s preferred point and away from the majority party median’s ideal point” (p. 41). In the end, the majority party obtains the outcome it wants while still allowing legislators to vote their sincere preferences on final-passage votes (Lawrence, Maltzman, and Smith, 2006:41).⁹ Under the Party Gatekeeping model, the Left Pivot is the most liberal actor among the majority-party medians in each chamber, the chamber medians, and the president. The Right Pivot is the most conservative among the majority-party medians in each chamber, the chamber medians, and the president.¹⁰

A third model, called the Committee Gatekeeping model, posits that legislation turns on committee preferences (Shepsle and Weingast, 1987). For a bill to proceed to

⁹ The majority party can allow members to vote sincerely on final-passage votes, then, because it has already siphoned out the cases in which sincere votes would make the party worse off.

¹⁰ There is considerable disagreement among congressional scholars as to whether the majority party in the Senate possesses the same negative agenda control as the House majority party (Cox and McCubbins, 2005; Smith, 2007). This debate is irrelevant to my study, as the Senate majority-party median was never the leftmost or rightmost pivot.

a floor vote, the committee with jurisdiction over the subject matter must first report it out. As such, committees can bottle up legislation that committee members dislike. According to this theory, committees will keep the gates closed (i.e., fail to report out a bill) when the policy they expect the chamber median to make is worse for them than is the status quo. That is, once the committee reports the bill to the full chamber, an open rule allows the chamber to amend it down to the median member's ideal point; the result is a bill with the policy location of the parent-chamber median. Accordingly, if the committee median is closer to the status quo than to its parent-chamber median, that person will bottle up the legislation in committee. It is only when the committee median is closer to the parent-chamber median than to the status quo that the committee median will open the gates. Thus, the Left Pivot under the Committee Gatekeeping model is the most liberal among the Judiciary Committee medians, the chamber medians, each Judiciary Committee Median's indifference point vis-à-vis its parent-chamber median, and the president. The Right Pivot is the most conservative among the Judiciary Committee medians, the chamber medians, each Judiciary Committee Median's indifference point vis-à-vis its parent-chamber median, and the president.

Finally, the Veto-Filibuster model argues that legislative outcomes must overcome the hurdles of both the veto and filibuster pivots (Krehbiel, 1998; Primo, Binder, and Maltzman, 2008). To override a presidential veto, each chamber of Congress must acquire the consent of two-thirds of their members. What is more, individual senators may filibuster legislation until stopped via cloture, which requires the consent of sixty senators.¹¹ Because legislative actors can use these institutional powers with relative ease, legislation often requires large, bipartisan coalitions (Krehbiel, 1998). The relevant pivots under this model depend on political circumstances. For Democratic presidents, the Left Pivot is the most liberal of the 146th representative, the 34th senator, and the House and Senate medians, while the Right Pivot is the 60th senator. For Republican presidents, the Left Pivot is the 40th senator while the Right Pivot is the most conservative among the chamber medians, the 290th representative, and the 67th senator.

DATA AND METHODS

To examine whether the Court is less likely to grant review to a case when it makes policy worse for the political branches than the status quo—and thus, can expect an override—I examined 430 paid certiorari petitions and appeals that made the Supreme Court's discuss list between the 1953-93 terms in which the petitioner requested the Court either to engage in statutory interpretation over a federal statute or to exercise judicial review by striking one down.¹² That is, I build on the work of Sala and Spriggs

¹¹ In 1975, the Senate lowered the number of votes needed to invoke cloture from 2/3 to 3/5. Before that change, the filibuster pivots were the 34th senator and the 67th senator.

¹² I obtained the Court's discuss lists from the papers of former Justices Blackmun, Brennan, Burton, Warren, and Douglas. Note that the "discuss list" came about in 1950. Previous to the discuss list, justices relied on the "special list." All cases were deemed worthy of review unless put on the special list. Special-list cases were summarily

(2004) by analyzing cases dealing with federal statutes. As those authors argue, such cases “tend to be highly salient politically and any successful congressional challenge is likely both to produce policy outcomes that make the justices worse off and harm the Court’s institutional reputation” (p. 202). The authors further point out that existing research shows that legislators may get involved both in statutory-interpretation cases and when the Court strikes down a statute (see, e.g., Rogers, 2001; Vanberg, 2001; Ignagni and Meernik, 1994; Meernik and Ignagni, 1997). Justices, therefore, “have some expectation that a Court opinion overturning a federal law may be reversed, giving them an incentive to act strategically” (p. 202).

My tests of strategic behavior require three sources of data—a measure of the status quo, a measure of each pivotal actor’s preferences (all of which must be on the same scale), and a set of archival sources that allow one to code the relevant factors present at the (private) agenda stage.

Measuring the Status Quo. To measure the status quo in each case, I followed two different strategies. The first strategy involved locating the status quo by examining the legislative coalition that voted to pass a bill (i.e., the subsection of the bill being challenged in Court). The second focused on the coalition of judges in the lower court that decided the appealed case.¹³

To determine the status quo under the first strategy, I began by reading the “Questions Presented” in over 3,000 cert petitions and appeals.¹⁴ If the petitioner requested the Court to interpret a federal statute or exercise judicial review over it, I retained the case. If not, I discarded it.¹⁵ After reviewing roughly 3,000 paid cert petitions and appeals, I retained 863 usable dockets. Once I determined the primary statutory subsection at issue in the case, I analyzed its legislative history to determine the most recent bill that created or modified it. I then entered each bill number into Poole and Rosenthal’s “Vote View” software to determine 1) whether there was a recorded

denied review. Thus, when I state that I analyze all cases that made the discuss list over this time period, I mean simply that I analyze all cases the Court discussed at conference. There is little concern of selection bias by looking at cases on the discuss list, for justices agree that nearly all petitions off the list are frivolous (Brennan, 1973; Ginsburg, 1994:479). What is more, it takes only one justice to place a case on the discuss list. While one justice might strategically refrain from putting a case on the discuss list, others can just as easily put the case on.

¹³ To be sure, there are theoretical and methodological limitations with any quantitative estimation technique. DW-NOMINATE coordinates may be unreliable. Similarly, assuming that the policy of a bill can be proxied by the NOMINATE score of the appointing president or senator (i.e., using the Judicial Common Space) may be problematic. Nevertheless, using these methods, while not perfect, improves on the existing state of understanding.

¹⁴ The “Questions Presented” explain which precise subsection the petitioner has invoked for review. When the “Questions Presented” were not clear on the subsection, I looked to the “Constitutional and Statutory Provisions Involved” section, which often quotes the main statute at issue.

¹⁵ To provide the cleanest test of the theory, I included only those petitions or appeals in which the petitioners invoked one primary statute or subsection thereof.

vote on the bill, and 2) if so, what the roll-call number of that vote was.¹⁶ Bills that passed via voice vote were excluded from the analysis, as were bills passed unanimously, since there is no usable roll-call data to determine their policy in Common Space.¹⁷ In total, out of the 863 petitions and appeals involving a federal statute, I was able to retain 430 observations with usable roll-call data. Following Sala and Spriggs (2004: 202) I then located the relevant DW-NOMINATE roll-call coordinates for each recorded bill and linearly transformed those coordinates into Common Space. This gave me a measurement of the status quo in the same policy space as the ideal points of justices, legislators, and presidents.

As an alternative way of measuring the status quo, I examined the Judicial Common Space scores of the judges presiding over the dispute in the federal court below (Epstein et al., 2007).¹⁸ The Judicial Common Space maps lower-court judges' ideological preferences on to the same scale as members of Congress and the president (and the Supreme Court). That is, using the preferences of appointing presidents and senators, the JCS estimates the preferences of lower court judges in a policy space that scales across institutions. Thus, when the petition arose from a federal circuit court or a three-judge district court panel, I coded the status quo as the JCS score of the median judge on the panel. In cases where a lower-court judge filed a dissent or special concurrence, I coded the status quo as the midpoint between the two judges in the majority. If the lower court reviewed the case en banc, I coded the status quo as the median judge in the en banc majority. When the case was appealed from a one-judge district court, I followed the coding methodology of Giles, Hettinger, and Peppers (2001).

Preferences of the Actors. To code the preferences of justices, members of Congress, and the president, I relied on Poole and Rosenthal's Common Space data and the Judicial Common Space (Poole and Rosenthal, 1997; Epstein et al., 2007). These data place actors in the same ideological space and provide measures of actors' policy preferences that are directly comparable across institutions (i.e., between Congress and the Court) and over time.¹⁹

¹⁶ If the bill went to conference and both chambers recorded a vote on the conference report, I coded SQ as the average Common Space score between the two chambers. When only one chamber recorded a vote on the conference report, I coded SQ as the Common Space score retrieved for it. Since both chambers are voting on the exact same bill (the conference report), the cutpoints for the two chambers theoretically should be identical. If there was no conference report (i.e., the final passage vote was the last vote), I looked to see if there was a recorded final passage vote on the bill. If so, I coded SQ as the average of the final passage votes for both chambers. If there was a recorded final passage vote in only one chamber, I coded SQ with that score. The VoteView software can be found at <http://www.voteview.com/>.

¹⁷ I regressed each member's DW-NOMINATE scores for the Congress in which the roll-call vote was held. I then used the parameters estimated from this model to linearly transform the DW-NOMINATE (first dimension) coordinates into Common Space (Sala and Spriggs, 2004:202).

¹⁸ I use this alternative SQ measurement strategy to overcome any limitations that may exist with the first. For example, it is possible (and perhaps likely) that the dispute before the Court turns on issues that were not the central dividing point in the congressional debate. If so, the second approach I use may be more appropriate.

¹⁹ As stated above, by coding the status quo as I did, I can compare the status quo with the revealed preferences of justices and the legislative pivots.

Source for Intra-Court Data. My data on the Court's internal information come from the preliminary cert-pool memos written in each case. I obtained data from the 1953-85 terms by searching through the papers of former Justices Blackmun, Brennan, Burton, Douglas, and Warren at the Library of Congress. For terms before the adoption of the cert pool, I read through the cert memos written by Justices Burton's and Douglas's law clerks. My source for the 1986-93 terms come from Epstein, Segal, and Spaeth (2007). Of course, because Blackmun's papers conclude in 1994—and I require archival data to code most of the controls—the analysis stops just short of the 1994 Republican takeover in Congress.²⁰

My dependent variable looks at whether the Court granted review to the docketed case. It takes on a value of 1 if the Court granted review to the case and 0 if it did not grant review. My key covariate is *Vulnerable Court*, which takes on a value of 1 when the Court is constrained (i.e., in Regime 1 or its mirror), and takes on a value of 0 when the Court is semi-constrained or unconstrained (i.e., in Regimes 1, 3, and 4 or their mirrors).²¹

I control for a host of additional factors that might lead the Court to grant or deny review to a case. To control for the political salience of the case, I examined the activity of organized interests at the Court's agenda stage. That is, *Amici* is a count of the total number of amicus curiae briefs filed both in support of and in opposition to the petition for certiorari (Caldeira and Wright, 1988) as noted in the cert-pool memo in the case. *Dissent Below* takes on a value of 1 if the pool memo in the case notes a dissent in the court below; 0 otherwise. *Reverse Below* equals 1 if the intermediate court reversed the trial court; 0 otherwise. Additionally, I code *Conflict Below* as 1 if the cert-pool writer noted a conflict in the lower courts over the correct interpretation, application, or both of federal law; 0 otherwise. I also controlled for the position of the solicitor general. If the SG requests review be granted (either as petitioner or as an amici advocating the grant of review), *US Support* takes on a value of 1; 0 otherwise. If the SG was respondent or filed an amicus brief opposing review, *US Oppose* takes on a value of 1; 0 otherwise.²² Finally, I examine whether the lower court struck down the federal statute at issue. If so, *Lower Court Strike* takes on a value of 1; 0 otherwise.

RESULTS

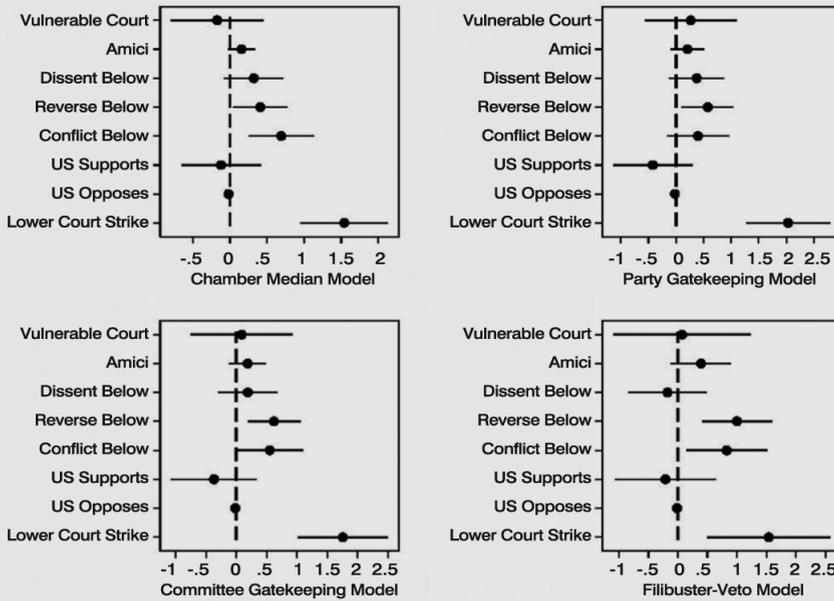
Figure 4 presents the results of the separation-of-powers model for each theory of legislative decision making. The solid circles are the parameter estimates, and the hori-

²⁰ Certainly, it would be nice to have archival data that span into the late 1990s and early 2000s. Unfortunately, said data do not exist. Justice Blackmun's files end with his retirement from the Court in 1994. Because I require these data to account for critical agenda-setting controls, I must end the analysis in 1994. Nevertheless, there is enough variation in the data herein to test the separation-of-powers theory.

²¹ As stated below, as a robustness check, I examined only the unconstrained versus constrained regimes. The results, of course, remained the same.

²² The Court sometimes calls for the views of the solicitor general, at which point the SG's office is forced to make a recommendation in the case. Controlling for invitations does not change my results.

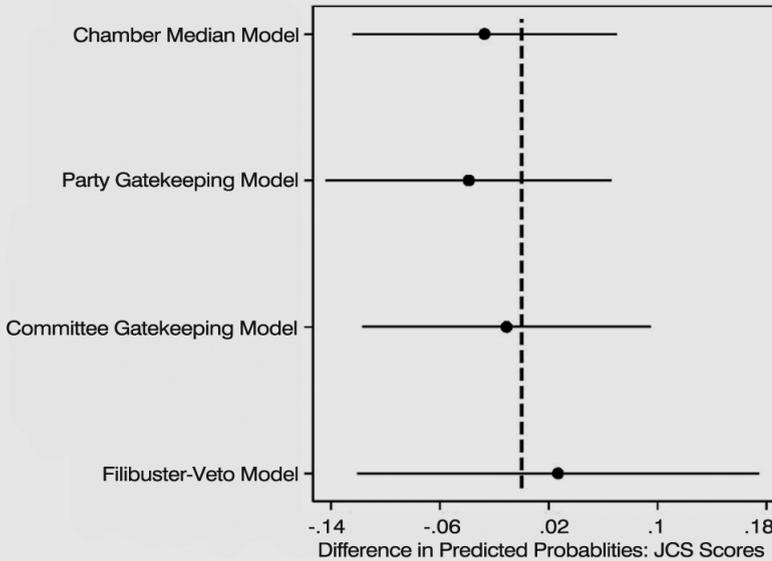
Figure 4
 Probit Model Estimates of Court’s Decision to Grant Review to a Case



Dependant variable in each model is whether Court grants review. The solid circles are the parameter estimates and the horizontal lines represent the 95 percent confidence intervals for those estimates based on robust standard errors. Coefficient on US Oppose is negative and statistically significant in Party Gatekeeping and Committee Gatekeeping models. For information on constant and other model results, see Appendix.

zontal lines represent the 95 percent confidence intervals for those estimates based on robust standard errors. The controls perform largely as expected. More important, the coefficient on *Vulnerable Court* in every model of legislative decision making fails to achieve statistical significance (see Figure 4). Take first the Chamber Median model. This model argued that when the Court was more liberal than the status quo, the House and Senate chamber medians, and the president, it would strategically decline to review the case. The results, however, do not support such an inference. While the coefficient on *Vulnerable Court* in the Chamber Median model is negative, it does not approach conventional levels of statistical significance. To underscore this point, I calculated the predicted probability that the Court would grant review to a case, depending on whether it was constrained or not. The difference in the predicted probabilities of granting review between a constrained Court and an unconstrained or semi-constrained Court in each legislative model are never significant. For example, under the Chamber Median model, the predicted probability that the Court will grant review to a case if it is unconstrained or semi-constrained is 0.103 (0.047, 0.158). The predict-

Figure 5
Predicted Probabilities of the Difference Between Constrained Court and Unconstrained and Semi-Constrained Court



The solid dot is the point estimate and the vertical whiskers represent 95 percent confidence intervals around that estimate. These values were calculated using `pvalue` in the `SPost` series of commands implemented in Stata 10 by Long and Freese (2006). All other variables are held at their mean or median values. =426 in the Chamber Median model, 278 in the Party Gatekeeping model, 299 in the Committee-Gatekeeping model, and 203 in the Filibuster-Veto model. Different numbers of observations are the result of unique legislative equilibria under each legislative model.

ed probability that a constrained Court will grant review to the case is 0.075 (-0.014, 0.164). While there is a decrease in the predicted probability of a grant vote, the interval around the average difference between the predicted probabilities, -0.027 (-0.119, 0.063), contains 0, which means that I cannot reject the null hypothesis that there is no separation-of-powers influence.²³

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

²³ These values were calculated using `pvalue` in the `SPost` series of commands implemented in Stata 10 by Long and Freese (2006). All other variables are held at their mean or median values.

Models that employ the second method of coding the status quo produce similar results. Figure 5 presents the difference in predicted probabilities of a constrained Court voting to review a case versus an unconstrained or semi-constrained Court electing to review that case. The difference between the predicted probability of a constrained Court and unconstrained or semi-constrained Court voting to review is never statistically significant in any of the legislative models (see Figure 5).²⁴ That is, the interval around the average difference between the predicted probabilities contains 0, which means that I cannot reject the null hypothesis that there is no separation-of-powers influence. Simply put, there are no systematic differences between the probability that a constrained or non-constrained Court will grant review to cases.

To check the robustness of these findings, I engaged in a number of analyses. First, I refit all of my models using alternative specifications of the standard errors. I re-estimated every model using asymptotic standard errors instead of robust standard errors. None produced results supportive of the separation-of-powers model. Second, I refit all the models comparing only the constrained Court with the unconstrained Court (i.e., omitting observations where the Court was semi-constrained). The results still did not support the separation-of-powers prediction.²⁵ Third, I estimated the Bayesian Information Criterion (BIC) for every model, comparing the BIC in the separation-of-powers model to the BIC in a controls-only model.²⁶ The model with the smallest BIC is the best model given the data (Primo, Binder, and Maltzman, 2008). In every comparison of separation-of-powers models to controls-only models, the controls-only BIC was at least 4.352 smaller than the separation-of-powers model, providing positive support for a non-separation-of-powers model of agenda setting (Long and Freese, 2006:113).

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

DISCUSSION

This study builds on existing work and finds further evidence to suggest that the Court does not play the separation-of-powers game—at least as currently conceived. The few existing studies that analyze whether the separation of powers influences the Court's

²⁴ These results remain substantively similar if I include a control variable to capture the ideological distance between the Court median and the status quo.

²⁵ I refit these models as well using asymptotic standard errors. The results were equally unsupportive.

²⁶ As Bonneau et al. (2007:901) explain, the BIC “compares two nonnested models by looking at the Bayes Factor, which reduces to the ratio of posterior odds.” The BIC, in essence, compares non-nested models by “comparing the probability that each model is the true model given the observed data” (p. 901).

agenda votes assume that key legislative pivots will automatically override Supreme Court decisions that fall outside the legislative equilibrium. This assumption certainly is reasonable as a modeling tool and has an established pedigree. Still, one wonders if the assumption fails to capture important conditional features of the multistage game (Hansford and Damore, 2000). Clinton (2007), for example, finds a number of observations in his analysis of federal minimum-wage legislation where status quo policies clearly fell outside the legislative equilibrium but were not overridden. Perhaps, then, Congress becomes “activated” only when the Court makes policy worse for it than the status quo. Perhaps the status quo that falls outside the legislative equilibrium remains because political actors cannot or choose not to move it. If political actors choose not to revise that offending status quo, the Court might not expect a legislative override when it makes better policy for Congress and the president. As such, it is plausible that existing modeling tools have been too stringent in their assumptions and overlooked potential separation-of-powers effects.

To analyze the question from such a perspective, this study offered an alternative model, which examined strategic judicial behavior that is conditioned by the location of the status quo and the whether the Court’s decision would improve or worsen it in the eyes of Congress and the president. I examined whether the Court played the separation-of-powers game under a less restrictive set of assumptions, namely, that justices will expect legislative overrides only when they make policy that is worse than the status quo. The results support the findings of others (Owens, 2010; Sala and Spriggs, 2004; Spriggs and Hansford, 2001; Segal, 1997) and suggest that the Court does not heed the preferences of key pivots in Congress and the executive when setting its agenda.

Is this conclusive evidence that justices ignore the separation of powers? Certainly not. There are methodological and research-design issues with any separation-of-powers study that make its findings tenuous. On the methodological front, it might simply be too much to ask of existing measurement strategies to answer such questions. IRT models of judicial behavior, of course, are based on past judicial votes and to the extent that justices are influenced by separation-of-powers constraints, the measures themselves might be contaminated (Ho and Quinn, 2010). Similarly, estimating the status quo is difficult and often requires heroic assumptions. Given the sensitivity of SOP models to underlying measurement strategies, null findings could thus be the result of measurement issues. Still, the alternatives, such as relying on exogenous measures of judicial preferences—which are time-invariant (see, e.g., Segal and Cover, 1989)—pose their own problems (Epstein et al., 2007).

On the research-design front, no study can fully account for the conditions that must be present to trigger a legislative override, to say nothing of justices’ awareness of those conditions. Will all cases falling outside the legislative equilibrium result in an override? Of course not, and history shows it. At the same time, it is quite likely that policy disagreement is not alone sufficient for a constraint. Broader responses by Congress in the form of Court curbing and other hostile actions are likely to play a role

in how justices perceive their political environment (Vanberg, 2001; Staton, 2006; Clark, 2009). It is further possible that justices play the separation-of-powers game using instruments heretofore unstudied. Justices might use various institutional tools like reargument, a call for the views of the solicitor general, or linguistic instruments to overcome separation-of-powers constraints.

Despite these limitations, there is growing reason to be skeptical of strategic separation-of-powers theory. Interviews with justices suggest that they do not pay attention to legislative preferences (Perry, 1991). Congress, in fact, does override Supreme Court decisions (Esckridge, 1991a,b), suggesting that the Court may not—at least successfully—strategically modify its rulings to avoid legislative rebuke. In the end, then, while caveats are certainly in order—as they are with any separation-of-powers study—the data here suggest that the Court likely does not play the separation-of-powers game in a systematic manner. **jsj**

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APPENDIX

PROBIT MODEL ESTIMATES OF COURT'S DECISION TO GRANT REVIEW TO A CASE

Covariate	Chamber Median	Party Gatekeeping	Committee Gatekeeping	Filibuster Veto
Constrained court	-0.174 (0.317)	0.264 (0.423)	0.089 (0.425)	0.070 (0.595)
Amici	0.155 (0.093)	0.206 (0.153)	0.187 (0.154)	0.391 (0.257)
Dissent below	0.321 (0.204)	0.376 (0.255)	0.190 (0.249)	-0.176 (0.337)
Reverse below	0.410* (0.188)	0.575* (0.238)	0.625* (0.222)	1.001* (0.302)
Conflict below	0.693* (0.222)	0.398 (0.284)	0.551 (0.283)	0.826* (0.348)
US supports	-0.121 (0.270)	-0.419 (0.367)	-0.368 (0.360)	-0.212 (0.434)
US opposes	-0.020 (0.013)	-0.020* (0.010)	-0.015* (0.007)	-0.015 (0.008)
Lower court strike	1.542* (0.301)	2.031* (0.388)	1.761* (0.378)	1.537* (0.530)
Constant	-1.314* (0.158)	-1.407* (0.199)	-1.322* (0.179)	-1.573* (0.234)
N	264	180	191	117
BIC	300.585	202.278	217.828	142.487

* Denotes $p < 0.05$ (two-tailed test).