I – Introduction and Questions

1) Is the Supreme Court more likely to grant Certiorari to cases challenging those laws enacted by Congresses ideologically distant from the Court, relative to cases challenging laws enacted by Congresses ideologically close to the Court?
2) Is the Supreme Court more likely to grant Certiorari to cases challenging Congressional laws when it faces a sitting Congress ideologically close to the Court, relative to when it faces a sitting Congress ideologically distant from the Court? Further, how are the ideological distances between the Court and enacting Congresses related to the ideological distance between the Court and the sitting Congress?

Every year, the highest court in the land hears dozens of cases relating to past Congressional laws. In voting to overturn or uphold past legislation, the nine Justices of the Supreme Court make individual decisions that collectively alter (or support) Congressional policy. It must be noted, however, that the formation of the Opinion of the Court starts well before deliberations begin: the Court’s docket is formed by interaction between litigants and Justices in the agenda-setting phase, a process which proves vitally important in shaping the Court’s ultimate rulings. Interestingly, past literature has demonstrated that Court decisions may be altered by institutions beyond the bench; it is not a far leap to presume that this activity exists in the agenda-setting phase, as well. My research will probe this idea by focusing upon the actions of Justices, litigants, and Congress during the agenda-setting phase of Supreme Court deliberations.

II – Literature Review

Three primary models have emerged to explain the process of judicial-decision making. According to the “legal formalist” model, Justices simply observe precedent and attempt to make the ‘most just’ decisions possible. Justices have no personal preferences regarding case outcomes; their rulings and opinions are the result of purely neutral
jurisprudence.

A: The Attitudinal Model

On the other hand, “attitudinal” account holds that each Justice has ideologically based policy preferences. In every case, each Justice sees an optimal outcome that is shaped by that Justice's personal feelings regarding the legal world. Moreover, every Justice has a mental idea of where, in a perfect world, all Court decisions would fall. Thus, Justices' actions are aimed at moving Court opinions toward these personally determined 'ideal points.'

This may be represented by placing two Justices on a single unidimensional ideological continuum, as shown in figure 1 below. When a case is placed before the Court, Justices are asked to choose between two alternatives. In evaluating these options, Justices select the option closest to their own ideal point.

![Figure 1](image-url)

When ideal points of all nine Justices are aggregated on this same continuum, the
alternative closest to five or more ideal points will ultimately prevail. In Figure 2 below, the Status Quo prevails because it is closer to the ideal points of Justices A, C, D, E, and F than the alternative.

**Figure 2 - Ideal Points in Case 1**

An important implication of this voting framework is the importance of the median Justice in the decision making process. In Figure 3, a different case comes to the Court. Most of the Justices are consistent in their views. However, Justice F, again the median Justice, desires an outcome different than his previous allies on the left side of the scale. Because the median Justice prefers the alternative over the status quo, the balance of voting shifts to the alternative and so that option prevails.

**Figure 3 - Ideal Points in Case 2**
Therefore, in this system, the preferences of the median Justice will generally govern the ultimate conclusion of the Court. Because nine Justices have nine distinct ideological ideal points in any given case, the position of the median Justice relative to potential outcomes is the crucial factor in whether the status quo or the alternative prevails.

According to this theoretical scheme, Justices may be viewed as acting ‘sincerely,’ in that they consistently vote or act in support of their ideal points. Judges simply evaluate their possible actions in light of the current situation, and then choose the alternative that pushes Court ideology toward their own ideal point. In sincere voting, Justices garner the most satisfaction from consistently backing their own ideological beliefs.

Unfortunately, the realities of the attitudinal model are more complicated. Often, pushing a personal ideological view upon the Court requires more subtly than obvious activity allows. Unlike models of sincere voting, 'strategic' Justices take factors other than pure ideological goals into account. As rational actors, Justices know that they must be flexible on some issues in order to achieve their ultimate policy goals. For instance, when voting, Justices will drift from their ideological positions in order to bargain with other Justices (Revesz 2001) for votes in other cases. Schubert (1959) found that, in the 1940’s, liberal Justices engaged in strategic voting in granting and denying FELA petitions in order to push the Court’s eventual decision in a liberal direction. Boucher and Segal (1995) have also noted ideologically-oriented strategic behavior in the agenda-setting phase.

Over the past few decades, political scientists have exhibited a great deal of
support for the attitudinal hypothesis. A strategic and rational-actor theory of judicial
decision-making has emerged, wherein Justices have distinct ideological preferences and
seek to maximize personal utility by making choices that help to ensure the success of
these preferences over other alternatives. McGuire, Smith, and Caldeira (1999)
demonstrate that although analyses of Supreme Court voting patterns may often lead to
confusing empirical observations, justices are ultimately rational and motive-driven in
their deliberations. Cross and Nelson (2001), Caldeira, Wright, and Zorn (1999), and
Epstein, Knight, and Martin (2001) similarly identify and analyze specific voting patterns
based upon personal ideology. Furthermore, attempts to secure the hegemony of personal
ideological preferences are not limited solely to voting. For instance, in an examination
of Supreme Court deliberations, Rohde (1972) finds that assignment of the Opinion of the
Court serves as a strategic tool employed by the Chief Justice to forward his own
personal agenda.

Thus, the attitudinal model holds that the Opinion of the Court is the product of
aggregating personal ideologies rather than the rigorous application of scholarly
jurisprudence. Each Justice, armed with his own distinct beliefs, attempts to influence
Court ideology in a way that maximizes his own utility. Moreover, Justices behave
strategically in order to achieve their goals.

B: The Strategic Model

The “strategic” model encompasses the ideologically-based aspects of the
attitudinal model, but adds the corollary that judges’ actions are affected by the
ideological alignment of the executive and legislative branches. Justices are not myopic
figures who solely consider the relation of their personal belief to cases at hand. Rather,
in order to better influence national policy through judicial review, they extend their strategic planning beyond their bench.

The strategic model suggests that judicial decision making is a game between Congress, the Presidency, and the Supreme Court. Lawmaking, as intended by the Constitution, is the result of checks and balances between these three entities. Each party has an ideal policy point and seeks to support that point. For the President, this may entail vetoing or proposing legislation. Congress drafts laws that support its own ideology. The Court interprets or strikes down to further its own interpretation of ideal national policy.

In Figure 4, Congress passes three bills that are ideological proximal to its aggregate membership. The Court is likely to overturn or interpret law A because it is farther from its the Court than the Status Quo.

![Figure 4 - Judicial Review based on Congressional ideology](image)

This does not, however, mean that the Court will invariably strike down law A or any other law. The strategic model implies that, because all three parties recognize the nature of the lawmaking game and seek to have their own opinions persevere over others, each party has an incentive to consider the ramifications of their actions upon the other
branches.

For instance, even though the President may prefer to veto a bill that pushes the status quo far from his ideal point, he may not because such an action would antagonize an already hostile Congress. Alternatively, Congress may not send a well-supported bill to the White House if it expects a certain veto that would diminish its own legislation credibility.

Similarly, the Court, despite its celebrated independence, may actually fear disciplinary actions by an unfriendly Congress. After all, Congress has control over the Supreme Court's budget. Both the President and Congress have influence over the selection of lower federal judges and, more importantly, the selection of future Supreme Court Justices. As in historical instances like President Roosevelt's Court Packing plan or Lincoln's legendary disputes with Chief Justice Tawney, other branches can exert a compelling pull on judicial review due to their ability to quietly discipline an unfriendly bench.

Therefore, the strategic model suggests that Courts who fear such discipline may be less active in pursuing a potentially volatile agenda. Courts who enjoy the accompaniment of a friendly Congress have no fear of legislative regulation ought to be more active. These relationships have been supported by a battery of literature.

Through a comparison of the ADA scores of Congressional politicians with the composition of the Supreme Court, Spiller and Gelly (1992) show that, for cases involving labor policy, Supreme Court decisions are affected by Congressional ideology half of the time. Similarly, by examining cases won by the U.S. Government in which justices voted against their ideological preferences, Cross and Nelson (2001) demonstrate
that the presence of the United States as a party in a lawsuit causes justices to drift from their usual ideological positions. Epstein, Knight, and Martin (2001) show that moderate justices alter their voting patterns based upon who is in control of Congress in order to ensure that Court decisions ‘carry weight’ with the other branches of the government. Harvey and Friedman (2003) similarly demonstrate that the propensity to strike down legislation is linked to the degree of ideological alignment with Congress. Thus, in many cases, Supreme Court ideologies appear to be constrained by institutions thought to be independent from the judicial branch.

Like the attitudinal model, the strategic model supports the theory of rational and strategic Justices seeking to shape the law according to their ideological convictions. The strategic model adds that Justices' actions are modified by the realities of the rest of the government. It is in this area that this paper is focused.

C: Strategic Behavior in the Agenda-Setting Phase

The models and literature above are largely derived from examinations of Court decisions. However, before the decision phase, Justices must choose which laws are placed upon docket. Activity in the agenda-setting phase of deliberations frames the possible alternatives in the decision-making phase of deliberations. Moreover, because agenda-setting draws less attention than the plenary docket, “the selection of cases is fertile soil for strategic manipulation” (Caldeira, Wright, and Zorn, 1999). Analysis of judicial action in this area, then, is vitally important in understanding the mechanics of judicial review.

My investigation extends the theory of strategic and constrained Justices into the agenda-setting phase of Supreme Court decision making. It should be noted that there
are several ways in which a case may reach the Court; most frequently, litigants submit a Writ of Certiorari. This method as been carefully studied and is the method most widely employed by litigants, and for these reasons I have chosen to focus upon Writs of Certiorari. Every term, the Court is flooded with these Writs, and only a small percentage of them are actually heard.

To date, several studies have demonstrated that the acceptance of Writs is contingent upon factors other than the merits of a case; in other words, the Court’s agenda is shaped by Justices’ particular preferences and strategies. Writ selection is nonrandom. Through a statistical examination of a variety of cases, Ulmer (1984, 1972) identified various cues that significantly increased the chances of a case being granted plenary review, such as the presence of the United States as a petitioner, the presence of conflict between lower and higher Courts, and the presence of a civil rights issue. A similar analysis of the propensity of the Court to grant or deny a Writ conducted by Caldeira and Wright (1988) found that the presence of amici curiae briefs to be a significant factor in the decision to accept a Writ. In 1973, Ulmer found a compelling link between judicial ideology and Writ acceptance upon observing that liberal justices tended to favor “underdogs” while conservative justices favored “upperdogs” in this phase. More strikingly, in 1999 Caldeira, Wright, and Zorn demonstrate that justices make exceedingly strategic decisions in the Certiorari stage in order to best satisfy their preferences. Conservative Justices, for instance, will vote to accept a Certiorari that challenges a lower court’s conservative ruling if they believe that the Court will Affirm, thereby strengthening a conservative position. However, these same Justices will deny Certiorari if they believe that the Court will Overturn, because such a result would
weaken a conservative position.

In summary, Justices may be viewed as rational figures with ideological preferences and strategic methods for satisfying these preferences. This pervades both the decision phase as well as the agenda-setting phase. Also, in the decision phase, ideological preferences are often constrained by institutions beyond the Court, which serves as the basis for my claim that this constraint exists in the agenda-setting phase, as well. The literature strongly suggests that this mechanism is all-inclusive: in all types of cases—whether criminal appeals, Constitutional interpretations, or statutory examinations—Judges act strategically and may drift from their usual ideological positions to satisfy other institutions. This study seeks to fill a gap in the literature by tying the notion of deference to Congressional preference (which has been seems to exist in the decision-phase) into strategic action in the agenda-setting phase. Before moving on, however, another element of Supreme Court decision-making requires exploration: litigant behavior.

**D: Litigant Behavior**

Litigants are strategic players whose actions cannot be ignored. They influence the Court’s decisions because they are responsible for submitting cases for review. Importantly, litigants, like justices, are rational. They recognize that Court justices have distinct beliefs and are therefore strategic in their efforts to promote their own ideologies. Rational litigants incur the cost of bringing litigation to the Court only when they believe that there is a good chance they will succeed (Segal, Songer, and Cameron 1995; McGuire 1993). In turn, the Court, which is governed by its own ideology, chooses litigation that moves it toward its ideal point. Thus, what McGuire (1993) terms an
“impressive relationship” emerges between the Court and litigants, wherein litigants attempt to key into perceived Court ideology, and the Court selects litigation with an eye for supporting this ideology. Moreover, in 1988, Caldeira and Wright compared a list of those Writs accepted versus those denied to demonstrate that the Court does respond to litigant action in the form of amici curiae briefs—when litigants file briefs, the Court is more likely to hear cases. This further confirms that litigant behavior indeed affects Supreme Court decision-making. In 1998, the same authors revisited the question of litigant and Court interaction, and found that in 1968 a liberal Court and liberal litigants played off one another in the pursuit of a liberal agenda, and that the opposite was true for the conservative 1990 Court. In 1982, the presence of either liberal or conservative interests made no difference in the chances of case selection since the Court was moderate and its agenda not particularly polarized. A similar disparity between the Warren and Burger courts is found by Caldeira and McGuire in 1993. This study further underscores the link between Court agenda and like-minded litigants, and the somewhat cloaked cooperation that occurs between them. The relationship between litigants and the Supreme Court, then, may be viewed as one of strategic cooperation, wherein successful litigants are those that ‘help’ the Court move toward its ideal point.

It is important to note that, since litigants are rational, they recognize the existence of this relationship, and thus only litigate when they think that they can win. This renders statistical studies of litigant behavior inherently problematic, as attempting to garner information from comparing writs accepted to writs denied yields a somewhat skewed result due to the strategic nature of litigant behavior. Fortunately, acknowledging this case-selection problem enables us to address it, as is further explained in the ‘data’
In summary, Supreme Court decision making in the agenda-setting phase is a highly strategic endeavor. The preferences of justices, litigants, and extra-Court institutions coalesce to form judicial rulings. I further examine this relationship in the agenda-setting stage by examining the ideological alignment between the Court, Congress, and the Congresses responsible for enacting laws up for review.

III- Causal Model and Hypotheses

My research builds primarily upon the work of Anna Harvey and Barry Friedman. In "Electing the Supreme Court" (2003), they utilize several ideological scores to compare Court ideology to that of both the sitting Congress and the Congress responsible for enacting legislation up for review. This analysis demonstrates that the degree of ideological alignment between the sitting Congress and the Supreme Court affects the propensity of that Court to strike down existing Congressional legislation. This study seeks to determine whether this principle exists in the agenda-setting phase as well.

I expect that the Supreme Court would be more active in granting Certiorari that challenges Congressional legislation as it grows increasingly aligned with the sitting Congress. Friedman and Harvey have demonstrated that the Court is more active in striking legislation as the degree of alignment with Congress increases because, presumably, the Court becomes less concerned with retaliatory action from the legislature. This same rationale ought to apply to the formation of the Court’s plenary docket, since strategic judges certainly have the foresight to see that even considering certain cases will agitate a distant Congress. Moreover, research demonstrates that Justices’ strategic decisions in the agenda-setting phase are made with respect to their
ramifications in the decision-phase (Caldeira, Wright, and Zorn 1999, Boucher and Segal 1995, Schubert 1962). So, if the Court is more active in overturning laws in the decision-phase when closely aligned with Congress, the Court ought to be more active in considering laws when this is the case.

Hypothesis 1. The Supreme Court is more likely to grant Certiorari to cases challenging Congressional laws when it faces a sitting Congress ideologically close to the Court, relative to when it faces a sitting Congress ideologically distant from the Court.

The extension of this investigation to the agenda setting-phase will clarify two other points. First of all, Harvey and Friedman curiously find no correlation between the ideological makeup of the Congress responsible for enacting these laws and the actions of the Court. This runs contrary to intuition, for if we accept the theory of a rational Court with rational litigants, then we would assume that a Court would ‘target’ laws passed by ideologically distant Congresses. I hypothesize that, although this relationship may not significantly exist in the decision-making phase, it is present in the agenda-setting phase.

Therefore, I ask: does the Supreme Court take the ideological alignment of the Congress responsible for enacting a law into account when choosing whether to grant or deny a Writ? Spiller and Gelly (1992), Cross and Nelson (2001), Epstein, Knight, and Martin (2001), and Friedman and Harvey (2003) have all found that a significant correlation between Congressional and Court ideology exists in the final stage of deliberations. And, since we know that justices make strategic decisions in the Certiorari stage based upon both ideological preferences (Caldeira, Wright, and Zorn 1999) and the presence of certain ‘cues’ (Ulmer 1984; Ulmer 1971; Ulmer, Hintze, and Kriklosky
1973), it is not a far leap to suppose that one of the Court’s ultimate considerations in choosing whether to grant a review is the ideology of the enacting Congress. Given these factors, we may expect the Court to accept a greater proportion of Certiorari petitions that challenge legislation passed by ideologically distant Congresses. It is also probable that the distance between the sitting Congress and the enacting Congress is a factor in the decision to grant or deny, as, given judicial deferment to Congressional preferences, the degree to which Congress ‘dislikes’ laws the Court examines influences Justices’ affability toward reviewing those laws.

**Hypothesis 2.** The Supreme Court is more likely to grant Certiorari to cases challenging those laws enacted by Congresses ideologically distant from the Court than cases challenging laws enacted by Congresses ideologically close to the Court.

**IV – Data**

**A: Ideological Scoring**

Congressional scores in my dataset were drawn from the Poole-Rosenthal data, in which the authors estimated the ideological ideal points for members of the House, Senate, and the Presidency from 1937-1999. Poole and Rosenthal contend that Congressional politics can be understood though the variation of member ideology over time. Using advanced computing and statistical methods, they generate ideological scores for all Congresses within my dataset.

The ideological scores for the Supreme Court from 1987-1999 were drawn from two sources: the Martin-Quinn and Bailey sets. In “Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999,” Martin and Quinn estimate the ideological ideal points of Supreme Court Justices from 1953-1999 (Martin-Quinn 2002). They contend that ideal points do not remain temporally constant and
consequently utilize Bayesian methods to generate figures that change over time. In analyzing their own data, they find that their scores outperform previous non time-invariant models and thereby explain judicial behavior across several fields.

In utilizing these scores, Friedman and Harvey identify a problem: although the Poole-Rosenthal data measures Congressional and Executive ideology relative to each other, the Martin-Quinn data measures Court ideology relative only to itself. Thus, although each dataset proves empirically accurate, each is not necessarily ‘in tune’ with the other. For example, a major ideological shift to the left in Congressional ideology may not place the Poole-Rosenthal score to the left of the Martin-Quinn score, even though, in the reality, Congress has drifted to the left of the Court. With this rationale in mind, Friedman and Harvey rescale the Martin-Quinn scores to more accurately reflect the realities of the Congressional/Court relationship. Again, following their work, I will utilize both the regular and the rescaled Martin-Quinn scores.

Another problem arises in the Martin-Quinn scores. Because calculations for ideal points are based upon actual votes in decided cases, the possibility of a Justice voting strategically rather than sincerely makes it difficult to accurately apprise his true ideology.

For this reason, I follow Friedman and Harvey in also utilizing the Bailey set, a series of scores that places Senators, Presidents, and Justices on the same ideological continuum. This effectively sidesteps both of these methodological problems. Like

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Martin-Quinn, the Bailey scores use MCMC\(^3\) techniques to account for Justices’ preferences changing over time. However, Bailey’s dataset also bridges several institutions, and thus provides more grounded insight into the dogmatic differences between the Judiciary and the Legislature. Because the ideological scores of institutions are scaled together rather than separately, Bailey scores serve as an acceptable alternative to combining Poole-Rosenthal and Martin-Quinn scores. Both score sets are utilized in my analysis; the results of regressions using different score sets are consistent.

**B: The Problem of Case-Selection**

Because litigants are rational actors who tend to submit Writs of Certiorari when they believe that they will be accepted (Segal, Songer, and Cameron 1995; McGuire 1993), examinations of the Certiorari lists produces a somewhat skewed statistical result. For instance, liberal litigants tend to litigate in greater numbers when they face a like-minded Court, and remain relatively inactive when they face a conservative Court (Caldeira and McGuire 1993; McGuire 1993). Thus, it appears that definite links exist between the agenda of successful litigants and the agenda of the Court (Caldeira and McGuire 1993; McGuire 1993; Segal, Songer, and Cameron 1995). McGuire puts it best (1993): “those [litigants] who believe they have a stronger chance of winning, petition the Court; those who view their likelihood of success lower, do not.”

The strategic nature of litigant behavior thereby renders an examination of Certiorari inherently problematic, as the makeup of the Court determines, in part, the actions of ideologically-minded litigants. Therefore, in order to effectively analyze data for Certiorari, we must utilize a variable independent of strategic action on the part of

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\(^3\) Markov Chain Monte Carlo
To contend with this difficulty, Friedman and Harvey ‘track’ the fate of all laws from the 1986-1999 Congresses. From within this list, a comparison of those laws granted Certiorari to those not granted Certiorari produces results that are free from the trap of selection-bias. For each term, the lists, names, and reference numbers of all public laws enacted are available through the *Congressional Record*, which has extensive year-by-year databases for every year in my dataset. This data is available through an online service known as Thomas.

**C: Cases Challenging Congressional Laws Granted Certiorari**

With solid measures of ideological scoring and a detailed list of all public laws enacted from 1987-1999, I proceed to track individual laws. The first step in this process is determining when a case involving one of these laws is granted Certiorari.

For each year of the Rehnquist Court 1987-1999, I collected a list of cases challenging Congressional laws that were granted Certiorari. The basic list of all cases granted Certiorari is available in the massive Spaeth dataset, which contains variables for all Supreme Court deliberations from 1953-2001. Those cases that challenge a provision of the U.S. Code are indexed by the Title and Section of the Code that has been challenged; by cross-referencing this figure with the House’s U.S. Code Index (available online), I obtained the number of the public law that has been challenged. I then earmarked cases involving public laws that were enacted between 1986-1999 for use in my analysis. Those cases that do not involve public laws, or involve public laws passed by Congresses prior to 1986, are inconsequential to my research.

In order to ensure accuracy in observations, information from Spaeth was heavily
supplemented by a direct examination of the United States Reports, which contains complete transcripts of the Opinion of the Court for all cases decided since the Civil War era. However, since the vast majority of cases that are granted Certiorari in some way involve a Congressional law, determining when a given case has directly challenged legislation is difficult to determine. No perfect criteria can be devised. However, since the purpose of my experiment is to determine when the Court purposefully examines Congressional legislation, the following qualification was used: a case has interpreted a Congressional law if a Congressional law is the focus of the case. This occurs when, in the Opinion of the Court, the Supreme Court directly and explicitly upholds, strikes, or interprets a Congressional law.

When the Constitutionality of a law is examined, this is a fairly easy affair. However, the interpretation of legislation is a more complicated matter. Often, Justices use key phrases such as 'at issue here is U.S.C. 314-99' or 'the prominent question is the application of the Coal Worker's Benefit Act.' Interpretation also takes place when words within statutory language are defined or clarified. When no obvious cue exists, I utilized common sense.

D: Determining Enacting Years

As Friedman and Harvey point out, determining the year that a challenged law has been enacted proves somewhat problematic, as laws are frequently amended and re-enacted over the years. I followed their criteria for determining the enacting year. Namely:

1) If Congress re-enacts a law, it may be considered ideologically supportive of that law, and the year of re-enactment may be considered the year of enactment.
2) In the event that an amendment to a statute is specifically examined by the Court, that amendment may easily be identified with its appropriate Public Law. However, if a statute ‘at-large’ is under examination and an amendment is thus ‘investigated by association,’ I pose the question “did the fact of amendment show support for the part of the statute examined by the Supreme Court?” This occurs when, for instance, a statute forbidding the production of liquor within 100 yards of a school is amended to forbid the production of beer within 100 yards of a school.

This process is simplified when Justices specifically indicate that an amendment is under examination. In addition, amendments that simply change the organizational language of statutes are not considered operative amendments for the purposes of this study, as these amendments tell us little of Congressional intent.

E: Laws Examined More than Once

In many cases, the same Congressional laws are examined more than once over the years. Because the repeated examination of a statute simply indicates that various Courts were disposed to evaluate that statute, such data is not problematic. However, a potential difficulty emerges when the same law is examined multiple times by the same court in the same year. 4 When several similar cases arrive at the Court, Justices usually lump them into a single consolidated case. Often, however, it is easier to rule on specific elements of a given law by hearing each case separately in order to independently examine specific legal principles. That the Court opts to interpret portions of a given law over several cases [often heard in the same day] does not necessarily mean that it is placing greater emphasis upon that law. Rather, these scenarios are the product

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4 This occurs rather often. For instance, the 1998 Court heard cases relating to the interpretation of Public Law 101-336 four times during that Term.
of a single strategic decision designed to most efficiently answer jurisprudential
questions. To ensure that such situations do not unduly effect the data, laws that appear
before the Court both in the same and different years are coded separately for
examination. There is little variation.

V – Analysis

A: Variables

With this data in hand each public law enacted from 1986-1999 is tracked. Each
observation, then, consists of law $x$ in year $y$. So long as a case challenging a given law is
not granted Certiorari, that law is coded as ‘0’. When such a case is granted Certiorari,
that law is coded as ‘1.’ The ideological distance between the Court and the sitting
Congress, and the Court and the enacting Congress will be attached to each observation; I
utilized the regular and rescaled Martin-Quinn scores, the Bailey scores, and the Poole-
Rosenthal scores. For all tests, these distances comprise the independent variables. The
primary dependent variable is $r$, representing whether or not a case challenging a given
law was granted Certiorari. However, other dependent variables were also utilized in
order to better analyze data. A fuller explanation is available in the appendix.

Comparison of various independent and dependent variables was conducted using
robust probits in STATA.

B: 'Silly' Laws

It is a simple fact that many laws are simply not going to be reviewed. A
resolution honoring the life of Johnny Cash will not be placed on the Supreme Court's
docket, nor will a public law establishing Lupus Awareness Month. Hundreds of laws
are so innocuous that no litigant would expend resources to bring them before the Court,
and no reasonable Court would ever grant certiorari to such legislation.

To address both of these difficulties, I use research by Adler, Howell, Cameron, and Riemann, in which the authors classify 'significant' laws from 1945-1994. 5

C: Issues with Using Data from 105 and 106 Congresses

Although data from every Court year was considered, using observations from the 105th and 106th Congresses proved problematic for a simple reason: the Supreme Court cannot immediately hear cases. Often, litigation requires several years of appeals before it reaches the highest Court in the land. Thus, including laws passed by these later Congresses threatens to unfairly bias results because, although the Court might (or might not) desire to review such legislation, it is not given ample opportunity within a two year window to do so. To solve this problem, regressions were performed separately using data from the 100-104th Congresses and 100-105th Congresses. The latter process made data slightly less significant but had no compelling effect upon conclusions.

VI- Results and Conclusion

The results of all regressions--those conducted using the regular and rescaled Martin-Quinn scores, those conducted using the Bailey scores, and those conducted controlling for 'significant' laws--are extraordinarily consistent. Collectively, the data strongly confirms that a nonrandom relationship exists between the propensity of the Supreme Court to hear cases related to Congressional laws and its own ideological alignment with Congress. It also suggests that the probability of reviewing laws is related to the ideology of the Congress passed that law. Specifically:

A: As the distance between the sitting Court and the sitting Congress increases,

the likelihood of that Court examining legislation decreases. In other words, as hypothesized, the Court is more likely to examine legislation when it faces an ideologically close Congress than an ideologically distant one.

This essentially extends the results of the Harvey-Friedman paper on Constitutional cases into the agenda-setting phase. Just as Courts are more active in overturning legislation when aligned with Congress, Courts appear to be more active in considering legislative issues when aligned with Congress. In other words, the same theoretical mechanisms that exist in the decision-phase of deliberations also appear in the agenda-setting phase.

**B:** As the degree of alignment between the sitting Court and an enacting Congress increases, the propensity of that Court to examine that legislation decreases. In other words, the Court is less likely to examine legislation passed by ideologically distant Congresses.

This suggests that the Courts does not simply 'target' laws that it does not like. Other motives, however, may exist. By more actively examining ideologically proximal legislation than distant legislation, Justices may actually be defending such laws against alteration by lower courts. Determining the exact reason for this behavior is an area meritorious of further research.

**C:** The ideology of the sitting or enacting Congresses seem to have no bearing on the Court's propensity to hear Constitutional cases. There, it appears, variation in accepting Certiorari petitions is random. This suggests that the Court is somewhat unrestrained when considering whether or not to hear cases relating to Constitutional issues. In setting its Constitutional agenda, then, the Justices may actually act with less
consideration given to personal or Congressional ideology. Perhaps, because of the added importance of these cases, the Justices remain unrestrained until the final phase of deliberations to maintain an air of impartiality. Perhaps varying degrees of alignment between the Congress and the Court affect litigant activity. The answer may also lie in the fact that a smaller number of Justices is necessary to accept a Certiorari petition than to alter the status quo. Whatever the case, some factor drastically alters the Court’s consideration of Constitutional cases as opposed to interpretive ones. More research would be useful in clarifying this issue.

These conclusions enforce the notion that the analysis of Supreme Court decision-making is not a cut-and-dry issue. Rather, Justices' ultimate decisions are the product of exceedingly complex and strategic mechanisms. The ideology of the sitting Congress, the ideology of laws relative to that of the Court, the actions of litigants, and the opinions of lower courts coalesce to form the Court's docket--and, ultimately, Court decisions.

Most importantly, this study further underscores the notion that the Court is not a wholly impartial organ. Rather, it is group of rationally minded individuals who strategically seek optimal solutions to legislative questions based upon their own preferences. The ideology of the Congress--both the sitting Congress and the Congress responsible for enacting legislation--figures strongly into this calculus. In short, then, the Court is restrained by Congress. The ideology of both sitting and enacting Congresses represents a significant factor in the Court's decision to accept or deny a Writ of Certiorari.
Appendix

Explanation of Variables

The default for all variables is 0.
r: Review. If a law is granted Certiorari, r=1.
r(-s): Review. However, in this case, regression is preformed without laws that are reviewed multiple times in the same year.\( r(-s) = 1 \).
i: Interpretation. If a law is interpreted (rather than submitted to a review of its Constitutionality,) i=1.
c: Constitutional. If a law is submitted to a review of its Constitutionality, c=1.
s1, s2, s3: Distances between the sitting Congress and the Court, based upon Martin-Quinn and Poole-Rosenthal ideological scores. s2 and s3 are the rescaled scores.
e1, e2, e3: Distances between the Court and the Congress that enacted legislation up for review, based upon Martin-Quinn and Poole-Rosenthal ideological scores. e2 and e3 are the rescaled scores.
b1: Distance between the Court and the sitting Congress according to floor medians model of Congressional decision making utilizing the Bailey scores.
b2: Distance between the Court and the sitting Congress according to the committee gatekeeping model of Congressional decision making utilizing the Bailey scores.
b3: Distance between the Court and the sitting Congress according to the majority party gatekeeping model of Congressional decision making utilizing the Bailey scores.
be: Distance between the Court and the Congress responsible for enacting legislation according to Bailey scores.

1. Regression using Martin-Quinn and Poole-Rosenthal Scores

| Dep. | Indep. | dF/dx | z     | p>|z| | 95% C. I. |
|------|--------|-------|-------|------|----------|
| r    | s1     | -0.045551 | -3.00 | **0.003** | -0.007347 - 0.001763 |
| r    | s2     | -0.0113383 | -3.37 | **0.001** | -0.017332 - 0.005344 |
| r    | s3     | -0.0067972 | -3.24 | **0.001** | -0.010584 - 0.00301 |
| r    | e1     | -0.0067952 | -2.98 | **0.003** | -0.011056 - 0.002534 |
| r    | e2     | -0.0146354 | -3.78 | **0.000** | -0.022159 - 0.007112 |
| r    | e3     | -0.0114651 | -3.76 | **0.000** | -0.017351 - 0.005579 |
| r(-s) | s1     | -0.0039581 | -2.86 | **0.004** | -0.006393 - 0.001523 |
| r(-s) | s2     | -0.008833 | -2.98 | **0.003** | -0.014 - 0.003666 |
| r(-s) | s3     | -0.0056484 | -2.99 | **0.003** | -0.00892 - 0.002377 |
| r(-s) | e1     | -0.0061369 | -3.18 | **0.001** | -0.009635 - 0.002638 |
| r(-s) | e2     | -0.0116422 | -3.57 | **0.000** | -0.017951 - 0.005334 |
| r(-s) | e3     | -0.0095689 | -3.63 | **0.000** | -0.014543 - 0.004595 |
| i    | s1     | -0.0029261 | -2.80 | **0.005** | -0.004843 - 0.001009 |
| i    | s2     | -0.0073352 | -2.83 | **0.005** | -0.011685 - 0.002985 |
| i    | s3     | -0.0073352 | -2.83 | **0.005** | -0.011685 - 0.002985 |
| i    | e1     | -0.0046603 | -3.41 | **0.001** | -0.007317 - 0.002004 |
| i    | e2     | -0.0095563 | -3.99 | **0.000** | -0.014456 - 0.004656 |
| i    | e3     | -0.0075012 | -4.11 | **0.000** | -0.011285 - 0.003718 |
| c    | s1     | -0.0016338 | -1.53 | 0.125 | -0.003623 - 0.00355 |
| c    | s2     | -0.0039627 | -1.82 | 0.068 | -0.007996 - 0.00007 |

A fuller explanation is available on page 13, section E.
<p>| | | | | | | |</p>
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2. Regressions using bailey scores
| Dep. | Indep. | dF/dx  | z     | p>|z| | 95% C. I. |
|------|--------|--------|-------|------|-------------|
| r    | b1     | -0.0045327 | -3.62 | 0.000 | 0.00683     | 0.002235 |
| r    | b2     | -0.0051868 | -3.22 | 0.001 | 0.007995    | 0.002379 |
| r    | b3     | -0.0030462 | -3.05 | 0.002 | 0.004682    | 0.001411 |
| r    | be     | -0.0082152 | -2.95 | 0.003 | 0.013318    | 0.003113 |
| r(-s)| b1     | -0.0031448 | -3.00 | 0.003 | 0.005097    | 0.001193 |
| r(-s)| b2     | -0.0042453 | -2.96 | 0.003 | 0.006643    | 0.001847 |
| r(-s)| b3     | -0.0036979 | -3.08 | 0.002 | 0.005714    | 0.001682 |
| r(-s)| be     | -0.0073634 | -1.96 | 0.050 | -0.014398   | 0.000328 |
| i    | b1     | -0.002888  | -3.24 | 0.001 | -0.004507   | 0.001269 |
| i    | b2     | -0.0033205 | -2.66 | 0.008 | -0.0082152  | 0.003113 |
| i    | b3     | -0.0030462 | -3.05 | 0.002 | -0.004682   | 0.001411 |
| i    | be     | -0.0082152 | -2.95 | 0.003 | -0.013318   | 0.003113 |
| c    | b1     | -0.0016263 | -1.89 | 0.058 | -0.003231   | 0.000022 |
| c    | b2     | -0.001878  | -1.81 | 0.070 | -0.003766   | 0.000022 |
| c    | b3     | -0.0017083 | -1.95 | 0.051 | -0.003296   | 0.000122 |
| c    | be     | -0.0008282 | -0.28 | 0.778 | -0.006566   | 0.004917 |

3. Regressions using significant laws

| Dep. | Indep. | dF/dx  | z     | p>|z| | 95% C. I. |
|------|--------|--------|-------|------|-------------|
| r    | b1     | -0.0028757 | -3.92 | 0.000 | -0.004416   | -0.001335 |
| r    | b2     | -0.0033752 | -3.65 | 0.000 | -0.005251   | -0.001499 |
| r    | be     | -0.008467  | -2.95 | 0.003 | -0.013988   | -0.002946 |
| r(-s)| b1     | -0.002284  | -3.27 | 0.001 | -0.003744   | -0.000824 |
| r(-s)| b2     | -0.003037  | -3.31 | 0.001 | -0.004796   | -0.001278 |
| r(-s)| b3     | -0.0026281 | -3.41 | 0.001 | -0.004108   | -0.001148 |
| r(-s)| be     | -0.007031  | -2.48 | 0.013 | -0.012298   | -0.001764 |
| i    | b1     | -0.0015583 | -3.27 | 0.001 | -0.002561   | -0.000556 |
| i    | b2     | -0.001817  | -2.83 | 0.005 | -0.003059   | -0.000575 |
| i    | b3     | -0.0016347 | -3.09 | 0.002 | -0.002661   | -0.000608 |
| i    | be     | -0.0054339 | -3.81 | 0.000 | -0.008753   | -0.002115 |
| c    | b1     | -0.0018966 | -2.19 | 0.029 | -0.002364   | -0.000029 |
| c    | b2     | -0.0014246 | -2.18 | 0.029 | -0.002813   | -0.000036 |
| c    | b3     | -0.001279  | -2.34 | 0.019 | -0.002457   | -0.0001 |
| c    | be     | -0.0016003 | -0.72 | 0.474 | -0.005998   | 0.002797 |

Works Cited


Boucher, Robert L., Jr., and Jeffrey A. Segal. 1995. “Supreme Court Justices as


Spaeth, Harold J. “United States Supreme Court Judicial Database, 1953-2000.” Available Online via ICPSR.


