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# A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases

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## 1. INTRODUCTION

The nature and process of the main regulatory changes of the last decade represent a challenge for political economists. Not only were major deregulatory processes undertaken without the active support of the regulated industries, but the process itself by which deregulation and regulation developed through the 1970s and 1980s is puzzling. While Congress legislated regulatory and deregulatory changes in some areas (e.g., airlines, trucking, cable, oil), in many other areas regulation and deregulation were promoted and carried out by agencies and the courts, without much active legislative change (e.g., telecommunications, pollution control).

The seeming inaction of Congress in the face of rapid regulatory changes,

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introduced by regulatory agencies and the courts, has been the subject of much recent research (see, e.g., McCubbins, Noll, and Weingast, 1987, 1989; Weingast, 1981, 1984; Weingast and Moran; Ferejohn and Shipan; McCubbins and Schwartz). This research has emphasized the agency relationship among the regulatory or administrative agencies, Congress, and the President. The role of the courts, however, has been mostly unexplored in this literature, except for the work of McCubbins, Noll, and Weingast (1987, 1989) and Marks. The former develop a framework where the courts are seen as indirect agents of Congress, in charge of supporting the interests of the coalition that enacted the original legislation. Marks, on the other hand, models the impact of judicial decisions on regulatory legislation. His main insight, which we borrow heavily from, is that the bicameral nature of Congress increases the set of Court decisions that are invulnerable to legislative action. In his framework, however, the Court is unconcerned with the impact of its decisions on the legislative process. Neither Marks nor McCubbins, Noll, and Weingast (1987, 1989) consider, and explore the implications of, the conditions for the justices to behave in the way the models stipulate.

The role of the Supreme Court in the design of public policy has, on the other hand, attracted much academic attention. The emphasis, however, has been basically normative. Particular attention has been given to the normative properties of different institutional arrangements—for example, whether the Supreme Court should follow a restrained or activist policy.<sup>1</sup> Whether any of those institutional arrangements would actually be carried out by self-interested agents, again, has not been analyzed.

In this article we follow the recent developments of the modern theory of administrative agencies, by developing a rational choice theory of the Supreme Court. Our framework combines two of the main characteristics of this literature: namely, the rational choice modeling strategy with the notion that institutions matter in the design of public policy. We differ basically by modeling the Supreme Court as a self-interested, ideologically motivated institution, making its decisions subject not to the traditional legal rules of precedent, but to the constraints arising from the political interests of other institutions of government—namely, Congress and the President.<sup>2</sup>

1. There has been a long-standing debate about whether the Court must follow an “activist” or “restrained” path. For recent surveys of the different approaches to the analysis of the Supreme Court, see Rohde and Spaeth, Halpern and Lamb, and Wasby. Among the classic positive approaches to the Supreme Court is that of Dahl, who claims that, because of their recruitment, the justices are a reflection of the electorate, and they play a “legitimizing” role. Dahl’s hypothesis was later expanded by Funston to reconcile short-term disagreements between the Court and Congress. An alternative view of the Supreme Court is provided in Adamany, who claims that the Court constitutes a force for instability.

2. Our Supreme Court resembles, then, in many respects the description of an “activist” court. In this sense, our Court also resembles the view of the Court held by critical legal scholars. Our approach, however, is radically different from theirs, as we develop the positive implications of such a behavioral assumption, rather than dealing with normative behavioral alternatives, not rooted in a microanalytic framework.

While we do not claim that this is the most realistic description of the actual workings of the Supreme Court, our model provides a simple positive framework that is rich enough to analyze and forecast changes over time in the behavior of the Court and in the determinants of public policy. Furthermore, many of the implications of the model are consistent with much of the current political wisdom on the role of the different political institutions, and are also empirically refutable.

We apply this approach to the analysis of two recent Supreme Court statutory decisions, the *State Farm* and *Grove City* decisions. We show that both Supreme Court decisions can be understood as the Court reacting strategically to changes in the relevant political constraints reflecting changes in both Congress and the Presidency, and not necessarily to legal precedent or to Congressional intent. Also, even though these two decisions can be seen as favoring different political tendencies, they are both consistent with a self-interested but politically moderate Supreme Court. While our analysis of these two Supreme Court decisions does not constitute an empirical test of our theory, it shows its potential usefulness to explain and forecast Supreme Court decisions.

While we argue in this article that the behavior of the Court can be understood as that of a self-interested, politically motivated actor, the justices' calculus differs from that of members of Congress. Unlike members of Congress, the Court does not necessarily have a relevant constituency whose interests it needs to consider in rendering its opinions.<sup>3</sup> On the other hand, the Supreme Court decisions are not taken in a political vacuum. The ability of other political actors to take actions to reverse the Supreme Court decisions is what constrains the scope and power of the Court.

While constitutional limits are important,<sup>4</sup> we focus here on the constraints on the Court's interpretation of statutes that result from the institutional structure of government (e.g., Congressional jurisdictional rules, the committee system, bicameralism, the President's veto power).<sup>5</sup>

While simple, our framework has several implications that could, in principle, be subject to empirical testing.<sup>6</sup> First, in our framework the Supreme Court "reads election results," as, even without changes in its composition,

3. Unlike members of Congress, or the President, who are directly elected in popular elections, the Supreme Court justices are not subject to the direct impact of electoral forces. Furthermore, interest groups do not have the same direct impact in the Court as they have in Congress. Their role in the judicial process is limited to their participation as litigants in cases where they might be directly involved, or, to the filing of "amicus briefs," in cases in which they might have interests at stake.

4. See, for example, Nowak, Rotunda, and Young, and Wasby.

5. Although these institutional arrangements have been studied within the Congressional context (e.g., Shepsle and Weingast, 1981, 1982; Weingast and Moran), few attempts have been made to analyze their effects on Supreme Court decisions. See, however, Marks, who analyzes the effect of Congress on the Supreme Court's decisions.

6. See Spiller and Gely (1990a) for an attempt to test empirically this approach using labor-relations cases.

the Court is responsive to changes in the electorate.<sup>7</sup> The impact of the electorate or of interest groups, however, is indirect, and it is effected through changes in the constraints faced by the Court, following changes in the composition of Congress and in the Executive. Second, our model provides an explanation for the conventional wisdom that to a large extent the most important domestic role of the President is to appoint justices to the Court. In our framework, in the absence of veto power, the Supreme Court eliminates most of the President's discretionary power. With veto power, however, the President's views carry substantially more weight in determining the equilibrium. Third, the Supreme Court, in our framework, may increase or decrease the extent of policy stability. By reducing the power of the President, the Court may increase policy stability. On the other hand, the Court may also promote policy changes, as changes in the composition of Congress open the possibility for the Supreme Court to modify the status quo.<sup>8,9</sup> The Court, however, will follow a more "restrained" path in periods of Congressional stability. Thus, this model of the Supreme Court, which in principle resembles an activist Court, predicts that the Court will play different roles depending on the composition of (and changes in) Congress. The Supreme Court, however, whether "restrained" or "activist," will usually follow electoral changes. Yet an "activist" Court is nothing more than a Court siding with one of the houses of Congress, or with the President.

Finally, the model predicts that Congressional inaction will follow Supreme Court decisions, as these have already taken the composition of Congress into account.

## 2. THE THEORY

We develop here a simple model of the Supreme Court–Congress–President relationship. We focus on statutory rather than Constitutional issues. In Gely and Spiller (1989) we expand this framework to the analysis of Constitutional interpretations.

7. This result is similar to that advocated by many political and legal scholars (e.g., Funston; Handberg and Hill, 1980, 1984). We differ, however, in providing a microanalytic foundation to that claim. Furthermore, previous positive political analyses of the Supreme Court have focused, almost exclusively, on the impact of "realigning elections" on Supreme Court decisions, suggesting that those are the times when the Court and Congress will disagree (e.g., Handberg and Hill, 1984; and Adamany). Our result, however, is different. Various degrees of changes in the political system, not only drastic electoral results, may open opportunities for the Court to become more "active," and to affect the status quo.

8. See Marks for a related analysis.

9. It is usually claimed, for example, that, so as to retain its political capital, the Court will strategically retreat from politically untenable positions. See, for example, Nagel, Adamany, and Funston. While important in principle, we do not consider here reputational considerations in Supreme Court decisions.

Our analysis is based on several simplifying assumptions concerning our four players: the House, the Senate, the President, and the Supreme Court.

Our first set of assumptions concerns Congressional and Presidential preferences. We start by assuming a bicameral legislature, with both houses of Congress having well-defined and stable preferences over the policy space ( $R^2$ ), represented by strictly convex indifference contours (in particular, without loss of generality, we will assume them to be circular). The modern theory of Congressional institutions (e.g., Weingast and Marshall; Shepsle and Weingast, 1987, 1989) suggests that committees have substantial power over the issues under their jurisdiction. In particular, because of their gatekeeping and veto power (i.e., they may block legislation from being introduced, as well as kill or modify legislation in conference), committee members' preferences may dominate issue-specific legislation. Furthermore, if committee membership is not random, but rather is the result of a self-selection process (see Shepsle, and Weingast and Marshall), then committees will tend to be relatively more homogeneous in their issue-specific preferences than their respective chambers as a whole. Thus, our assumption about legislators' preferences is equivalent to assuming full control of legislature outcomes by the relevant committees.<sup>10</sup> Seen in this light, these assumptions may not drastically violate reality.<sup>11</sup> We further assume that the President also has well-defined and stable preferences over the policy space, represented by circular isopreference contours.

Our second set of assumptions concerns the preferences of the Supreme Court. We assume that the Court has well-defined and stable preferences over the policy space, which is also represented by strictly convex indifference curves. The source of the Court's preferences, however, is different from that of the legislators. While legislators "vote their district,"<sup>12</sup> Supreme Court justices are not subject to reelection. We assume, then, that the Court's preferences are essentially ideologically based.<sup>13</sup> Our assumption about the Court's preferences is similar to assuming that the Court is a single individual. This is a strong assumption as we assume multidimensional issues and, hence, the median voter theorem may not readily be applied.<sup>14</sup> We

10. For an extension of this framework to alternative models of Congressional decision-making, see Spiller (1990a).

11. See, however, Gilligan and Krehbiel for a different view of committee composition.

12. See Fiorina, Kalt and Zupan, Kau and Rubin, and Peltzman, for empirical tests of this proposition.

13. While the justices' monetary well-being may be unrelated to the issue in question, it is nevertheless reasonable to assume that they may have strong views about the substance of the case. Furthermore, political considerations form part of the appointment process, making it important to consider the political preferences of the justices. Thus, it is reasonable to assume that Supreme Court justices have stable preferences over the policy space.

14. For a discussion of this issue as it applies to analyses of the Court, see Easterbrook. Spiller and Gely (1990b), however, provide conditions under which the median voter result can be applied to a multidimensional bargaining game between the Court and Congress.

furthermore assume that the Court dislikes being reversed by Congress.<sup>15</sup> Finally, we perform our analysis under two alternative assumptions about the nature of decisions the Court can take. Most of the ensuing analysis is carried on assuming that the Court is free to make its decisions on a continuum, rather than just on a yes-or-no basis.<sup>16</sup> At the end of this section we extend this framework by allowing the Court only to make decisions on a yes-or-no basis.

Thus, each actor has an ideal point in  $R^2$ . We call H,S,P, and SC the ideal points of the House, the Senate, the President, and the Supreme Court, respectively.

We focus on policy-making. Policy can be made by a specific legislative act, by the actions of an administrative agency (i.e., a Presidential policy),<sup>17</sup> or by a Supreme Court decision. The role of the Supreme Court is to review administrative agencies' decisions, and in this way to define the policy that would take effect unless it is reversed by a joint action of the House, the Senate, and the President. The role of the President in our model is twofold: on the one hand, to interpret and implement Congressional decisions through administrative agencies; and, on the other hand, if it can and so desires, to veto Congressional decisions.

## 2.1. LONG-RUN POLITICAL EQUILIBRIA WITHOUT PRESIDENTIAL VETO

There are many ways of modeling the interaction among Congress, the President, and the Court. Here we consider a simple bargaining game among the House, the Senate, the President, and the Supreme Court, assuming first that the President does not have the power to sustain a veto.

15. That lower-court justices dislike being reversed is quite understandable, as their reputation may be related to how often they are reversed by superior courts. In the case of the Supreme Court, a similar rationale can be provided in a more general framework than the one we present here, one where Court legitimacy and credibility are important factors that cannot be taken for granted. In other words, a model of political institutions is needed where their relative powers are the result of some underlying game. Here, for example, we assume that what the Court says is actually the law, unless it is reversed by Congress. This assumes, for example, that the police will enforce the law. If the Court's legitimacy and credibility were extremely poor, then it is possible that their decisions will carry no weight in public decision-making, and our model would have no predictive power.

16. There are several reasons why this assumption may be proper. First, the Court is free to interpret in its own way each case that comes to it. Second, the decision to grant *cert* allows the Court to choose that case that fits its preferred outcome. Finally, it can use *dicta* to call for a particular type of case. Note, however, that, as we show below, should the Court constraint itself to decide cases on a yes-or-no basis, then the equilibrium will change.

17. We assume that administrative agencies, whether independent regulatory agencies or part of the executive branch, are fully controlled by the President. This assumption, which is counter to much of the recent literature on regulatory agencies (e.g., McCubbins and Schwartz; Weingast and Moran; McCubbins, Noll, and Weingast, 1987; Spiller, 1990b), is taken exclusively to simplify the analysis. As the analysis below will show, this assumption does not materially change the results.

We model the game in three stages with the President moving first, the Court second, and Congress last.<sup>18</sup> In the first stage, the President, through the administrative agencies, implements a statute. This implementation is then subject to review by the Court, which in turn determines the legal status quo. The Court's decision may leave the administrative interpretation standing, or may replace it with an alternative interpretation. In the third stage, the House and the Senate bargain. If they reach an agreement different from the current status quo (i.e., the Court's decision), then that agreement becomes the law. If they fail to reach an agreement different from the Supreme Court's decision, then the latter becomes the equilibrium.

To solve this game we work backward by first describing the bargaining problem between the House and the Senate corresponding to the final stage in the game. We assume that the outcome to the bargaining between the House and the Senate is Pareto efficient, in the sense that no other alternative outcome could improve the utility of one of the houses of Congress without reducing the utility of the other.<sup>19</sup> In other words, we assume that the outcome to the bargaining between the two houses of Congress is on their contract curve, which we denominate by  $C(H,S)$ . We also assume individual rationality, so that the bargaining process cannot make any of the two houses worse off than the status quo.

Thus, only points in  $C(H,S)$  are feasible equilibria. Consider a case where the Court's initial decision was outside  $C(H,S)$ . Since there is always a point in  $C(H,S)$  preferred by both the House and the Senate to a given point outside it, bargaining between the two will bring about a point on  $C(H,S)$ . Thus, the equilibrium to this game has to reside in  $C(H,S)$ . The Supreme Court, then, cannot force a policy outcome outside  $C(H,S)$ , as the House and the Senate can always agree on a point on the contract curve that will make them better off.<sup>20</sup> Similarly, the President cannot administratively imple-

18. Alternative sequences could easily be conceived. Games where either the Court or the President move last, however, are less interesting as, given our preference assumptions, they would always be able to implement their ideal points. Since most statutory cases deal with the Court scrutinizing administrative agencies' decisions, our assumption of the administrative agency (i.e., the President) moving first is quite realistic. One could model a four-stage game where, in the first stage, Congress passes a law, then the agency and the Court move sequentially, and, finally, the game ends with Congress moving again. This game, however, yields exactly the same outcome as the three-stage game described in the text.

19. This is not such an unreasonable solution. First, the Nash-bargaining solution concept is efficient. Furthermore, other bargaining structures have the Nash-bargaining solution as a limit case. See Binmore.

20. If the Supreme Court would try to impose its ideal point SC as the policy outcome, it will face a reversal by Congress. If the Supreme Court tries again, after being reversed, to impose its ideal point as the policy outcome, both houses of Congress will support a constitutional amendment to limit further the power of the Court. Observe, however, that if the Supreme Court's decision changes the status quo from one point to another, both in the contract curve, no constitutional conflict would arise because one house of Congress is necessarily mad



ment any policy outside  $C(H,S)$ , as either a Court or a Congressional decision will reverse it. Given that the outcome to the third stage is in  $C(H,S)$ , the Court's decision will take into account the correspondence between the initial status quo and the final congressional bargaining outcome. Since any point outside  $C(H,S)$  will be reversed by Congress, and given that the Court prefers not to be reversed, it will make its decision such that the policy outcome is on the contract curve between the House and the Senate. In this way Congress cannot agree on a different outcome, and the Court's decision becomes the law. The Court then will pick a point on  $C(H,S)$  that maximizes its own utility. This point will become the equilibrium.

Observe, furthermore, that if only a single point in  $C(H,S)$  maximizes the Court's preferences, then the President has no power, as the Court's action is independent of the initial status quo set out by the agency.<sup>21</sup> That is, in the absence of a Presidential veto, long-run political equilibria are determined exclusively by the preferences of the House, the Senate, and the Supreme Court. The President's current preferences, on the other hand, are inconsequential in determining long-run policies. In the bargaining game among the Court, Congress, and the President, the latter's role can simply be seen as that of providing a policy offer. If the offer is in  $C(H,S)$  and is the one most preferred by the Court, then that offer becomes the equilibrium. If it is not in  $C(H,S)$  or is not the same as the reversal point chosen by the Court, it will be reversed, by either the Court or Congress. Thus, the presence of the Supreme Court eliminates the power of the Executive.

The President, however, would have played a substantial role in determining the final equilibrium outcome in the absence of Supreme Court scrutiny. In this case, the President, through control of the executive agencies, could determine which policy point in the contract curve is actually implemented—hence, choosing that point in  $C(H,S)$  that maximizes his or her own utility. See point  $E_1$  in Figure 1A. In the absence of the Supreme Court, then, the Executive seems to have actual power. As discussed above, however, this result is reversed with the introduction of the Supreme Court.

The following Proposition summarizes the determinants of long-run political equilibria.

*Proposition 1.* Given the preferences and bargaining structure described above, and assuming that the President does not have veto power, a long-run

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better off by the Supreme Court move. See Wasby and Casper for discussions of the constitutional implications of a "ruling–response–ruling–response" sequence. See also Henschen.

21. If circular congressional preferences are assumed, then  $C(H,S)$  is linear and, given our assumption about the convexity of the Court's preferences, there is indeed a single point in  $C(H,S)$  that maximizes the Court's preferences. If, however,  $C(H,S)$  is not linear, and there are multiple equilibria to this game, then the President, through the administrative agencies, could actually pick that equilibrium that maximizes his or her own utility.

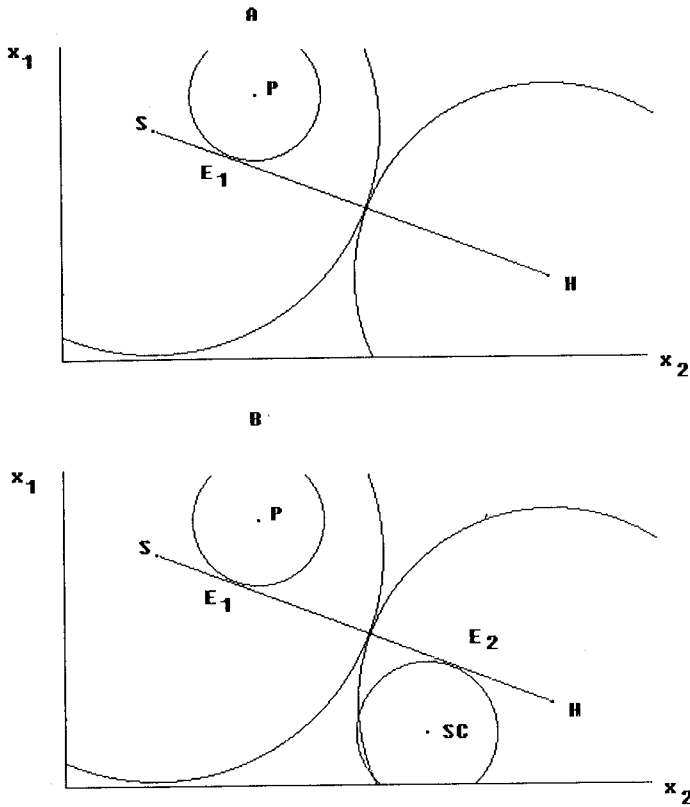


Figure 1. Political equilibrium (A) without and (B) with the Supreme Court. H: ideal point of the House; S: ideal point of the Senate; P: ideal point of the President; SC: ideal point of the Supreme Court;  $E_1$ : equilibrium without the Court;  $E_2$ : equilibrium with the Court.

political equilibrium is a feasible political outcome such that no alternative policy could make the Supreme Court better off.<sup>22</sup>

That is, a long-run equilibrium is that point in the contract curve between the House and the Senate that maximizes the utility of the Court ( $E_2$  in Figure 1B).

To understand the equilibrium to the game, it may be useful to analyze an example. Consider a case where neither the Supreme Court nor the President may have substantial influence on legislative outcomes (i.e., when the

22. Formally,  $X^*$  represents a long-run political equilibrium, if  $X^* = \{X | X = \text{Argmax } U^{SC}(x) \text{ s.t. } x \in C(H, S)\}$ .

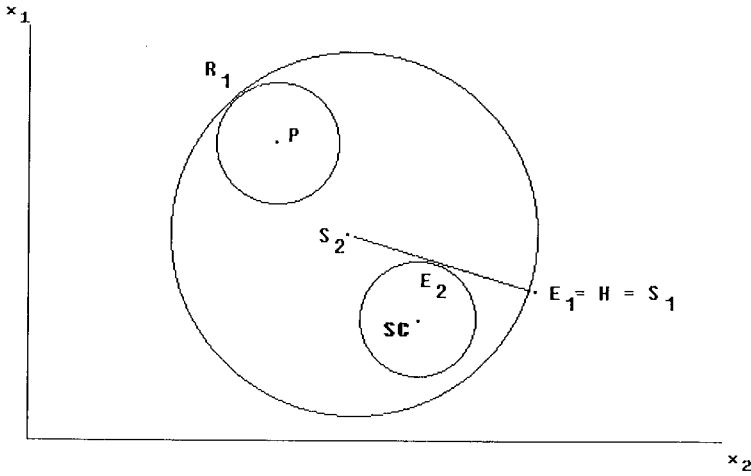


Figure 2. The Supreme Court and policy stability. H: ideal point of the House;  $S_1$ : initial ideal point of the Senate;  $S_2$ : subsequent ideal point of the Senate; P: ideal point of the President; SC: ideal point of the Supreme Court;  $R_1$ : President's most preferred point on the Senate's indifference curve through E;  $E_1 = H = S_1$ : initial equilibrium;  $E_2$ : subsequent equilibrium.

ideal points of both the House and the Senate are the same). Then, the long-run equilibrium is represented by their ideal point ( $E_1$ ), as in Figure 2. Figure 2 also depicts the positions of the President (P) and of the Supreme Court (SC). Assume now that, as the result of elections, the Senate changed drastically, with its new ideal point closer to that of the President. In the absence of any Supreme Court action, the House will block any new legislation that will change the status quo away from  $E_1$ . The President, however, could alter the implementation of the legislation. A policy point like  $R_1$  leaves the Senate indifferent between the legal status quo ( $E_1$ ) and the actual implementation ( $R_1$ ). Since the President is better off at P, it could be undertaken by an executive agency with the Senate blocking legislation to restore the status quo.<sup>23</sup> The Senate, however, could offer the House to legislate  $S_2$  as the legal standard. Such a policy would be preferred by the House to, say, P, or to any other point in the contract curve between the President and the Senate. Thus,  $S_2$  becomes the legal standard. The President, then, shifted the equilibrium from  $E_1$  to  $S_2$ . That is, in the absence of

23. The agency, however, may still face problems with Congress if the committee that oversees it does not support its policies. While the committee may not be able to force the agency to reverse its policy, it may try to influence the agency in different ways. Budgetary decisions as well as oversight activities may substantially disturb the agency's operations. See Spiller (1990b), and references therein.

the Supreme Court, the President could have a strong impact on public policy.

Let us now introduce the Supreme Court. In Figure 2, the position of the Supreme Court has improved following the elections, since there are points along the new contract curve between the House and the Senate that provide it with a utility level above that of  $E_1$ . Given the new location of the Senate, the Supreme Court's best choice is a point like  $E_2$ , on the new contract curve between the House and the Senate.

$E_2$ , then, becomes the equilibrium independent of the ideal point of the President. The President, however, appoints justices to the court. To the extent that the President can appoint justices with preferences similar to his or her own, the President may have a lasting impact on public policy.<sup>24</sup>

## 2.2. COMPARATIVE STATICS

The model just described can be used to understand changes in the position of the Supreme Court, even in the absence of changes in its composition. Proposition 1 implies that, in the absence of Presidential veto power, we do not have to consider the President's preferences for the purpose of analyzing the comparative statics properties of our model. Consider, for example, an initial long-run equilibrium,  $E_1$ , where the House and the Senate are as depicted in Figure 3. Let the results of an election imply a large change in the composition and preferences of the House. Since the Senate has not changed, any new legislative equilibrium (in the absence of any Supreme Court ruling) should reside in the new contact curve between the House and the Senate [ $C(H_2, S_1)$ ], and, in particular, in the bargaining area defined by  $E_1$ . The fact that the Senate did not change restricts the extent of policy change that can develop in the absence of Supreme Court intervention. Figure 3 shows, for example, that the new long-run equilibrium may well be outside that area, with the new long-run equilibrium,  $E_2$ , closer to the new ideal point of the House. Thus, the Supreme Court will usually follow the voters. This is, however, a qualified statement. Proposition 2, below, presents the conditions under which the Supreme Court follows the electorate.

*Proposition 2.* Assume that (a) preferences of the House, the Senate, and the Supreme Court are represented by circular indifference curves in  $R^2$ ; (b) the initial equilibrium is in the interior of the contract curve, then moves in the electorate where either only one house moves or both houses move in

24. We do not analyze here the selection of justices to the Supreme Court. Our previous discussion, though, suggests that it is not in the interest of the Senate to ratify the President's selection without considering the preferences of the candidate at hand. A full analysis of this topic is left, however, for future research.

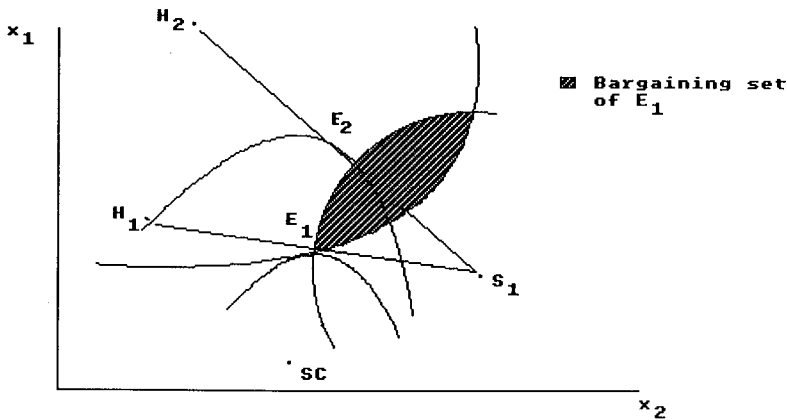


Figure 3. Comparative statics on the House's ideal point. SC: ideal point of the Supreme Court;  $H_1$ : initial ideal point of the House;  $H_2$ : subsequent ideal point of the House;  $S_1$ : ideal point of the Senate;  $E_1$ : initial equilibrium;  $E_2$ : subsequent equilibrium.

the same direction will imply changes in the long-run equilibrium which will follow the electorate, unless the change is in only one house; and (a) the dimension that changes is one that separates the House from the senate the most; and (b) the initial status quo implies a larger equilibrium value for that dimension than that of the ideal point of the Supreme Court.

Proposition 2, proved in the Appendix, shows<sup>25</sup> that the Supreme Court *does not* follow the electoral results only when (a) the electoral change implies a shift in, say, the House's ideal point along a dimension over which the House and the Senate were already far apart; *and* (b) the initial equilibrium value of that dimension exceeds the value for the ideal point of the Supreme Court.<sup>26</sup> Otherwise, the Supreme Court follows the electorate.

### 2.3. THE VALUE OF THE PRESIDENTIAL VETO

The model discussed above can be expanded to account for a more active Presidential role. Here, we explore the implications to the bargaining game previously analyzed by providing the President with veto power.

Presidential veto power expands the area of feasible legislative outcomes. To model the ability of the President to veto legislation, we follow McCub-

25. The proposition assumes circular preferences, a common assumption in spatial political models.

26. The first condition relates to the steepness of the contract curve, while the second condition relates to the position of the Supreme Court's ideal point in relation to the initial contract curve.

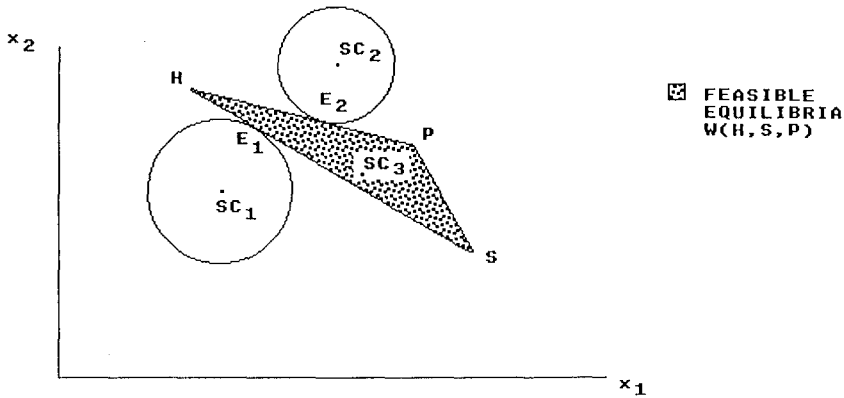


Figure 4. Feasible and long-run equilibria with Presidential veto power. H: ideal point of the House; S: ideal point of the Senate; SC: ideal points of the Supreme Court; P: ideal point of the President.

bins, Noll, and Weingast (1989) by assuming that any legislation must have the agreement of the House, the Senate, and the President.<sup>27</sup> In other words, any new legislation (and, in particular, any legislation to reverse the Court) cannot make any of the three actors worse off. Thus, we have to modify the third stage of the bargaining game in the previous section. Now it consists of bargaining among the House, the Senate, and the President.

We assume, again, that the outcome to the third-stage bargaining process is Pareto efficient and satisfies individual rationality constraints. Thus, all feasible legislative outcomes must reside (weakly) inside the area delineated by the three relevant contract curves [ $C(H, S)$ ,  $C(H, P)$ ,  $C(S, P)$ ; see Figure 4]. Call the set of feasible legislative outcomes  $W(H, S, P)$ . The outcome of the three-sided bargaining game will depend on the relative bargaining positions of the three players. All we can say is that for a legislative, or administrative, action to constitute an equilibrium it must be in  $W(H, S, P)$ .

The introduction of the Supreme Court provides a particular equilibrium to the game. As before, it is straightforward to see that a long-run political equilibrium is a feasible political equilibrium such that no alternative policy will make the Supreme Court better off,<sup>28</sup> and this is depicted in Figure 4.

27. Since we are modeling the House and the Senate as having well-specified preference orderings, we are focusing essentially on the preferences of the relevant committee with jurisdiction over the issues in question. We are, thus, not assuming that all, say, Senators have homogenous preferences. If that were the case, then Congress could overrule a Presidential veto. If Congress' preferences reflect only those of the relevant committees, they do not necessarily imply the existence of supermajorities in both houses and, hence, there is a role to the Presidential veto.

28. Formally,  $X^*$  is a long-run political equilibrium, if  $X^* \in \{X | X = \text{Argmax } U^{SC}(x), \text{ s.t. } x \in W(H, S, P)\}$ .

Again, the initial Presidential decision in the first stage is inconsequential, as it would be reversed by the Court if it did not maximize the Court's preferences.

We can then state the following proposition.

*Proposition 3.* (a) If  $SC \in W(H,S,P)$ , then  $SC$  is a long-run political equilibrium.

(b) If  $SC \notin W(H,S,P)$ , then the long-run equilibrium is in the boundary of  $W(H,S,P)$ .

The first result simply states that if the ideal point of the Supreme Court is located inside the set of feasible equilibria, then through judicial intervention, the Supreme Court will make its ideal point the long-run legislative outcome. If, however,  $SC$  is outside the set of feasible equilibria, then the long-run equilibrium is on a contract curve between any two of the three political actors.

To prove the proposition, consider first the case where the Supreme Court's ideal point is strictly inside  $W(H,S,P)$ , as is  $SC_3$  in Figure 4. Then by definition, any move away from  $SC_3$  will make at least one of the three political actors worse off, and thus will be vetoed by either the President or one of the houses of Congress.

Consider now the case where the Supreme Court's ideal point is outside  $W(H,S,P)$ . Were the Supreme Court to make a decision that falls outside  $W(\cdot)$ , further legislation will follow. Consider, instead a Supreme Court decision at the boundary of  $W(\cdot)$ . Any movement away from the point reflecting the Supreme Court decision will make at least one political actor worse off, and hence it will be vetoed. Since there is a point at the boundary of  $W(\cdot)$  that makes the Supreme Court better off than at any other point strictly inside  $W(\cdot)$ , the long-run equilibrium must be at the boundary of  $W(\cdot)$ , proving the proposition.

With Proposition 3 we can analyze the power of the veto. There are two cases to consider: one where the Supreme Court decision is on the contract curve between the House and the Senate, and another where the decision is on a contract curve involving the President. Consider the former case first, represented by  $E_1$  in Figure 4. In such a case, since the ideal points of the President and of the Supreme Court are on different sides of  $C(H,S)$ , the Supreme Court decision will be on  $C(H,S)$ . Thus, the veto power of the President is of no value to the President. The President cannot force a legislative outcome that moves the equilibrium outside of  $C(H,S)$ , as such a move would imply that either the House or the Senate or both would be worse off.

Now consider a case where the ideal points of the President and of the Supreme Court are on the same side of  $C(H,S)$ . In that case, the Supreme

Court's decision will be on a contract curve involving the President and, say, the House, represented by  $E_2$  in Figure 4. The Senate would like to move the legislative outcome strictly inside  $W(\cdot)$ . To do so it has to align necessarily with the House, since aligning itself with the President is not enough to overrule a Supreme Court decision. However, any movement away from the contract curve between the House and the President that makes the House better off necessarily makes the President worse off. Thus, the President will support the Supreme Court and veto Congress' overrule of the Supreme Court decision. The power to veto, however, does not provide the President with the ability to further shift the political equilibrium closer to its ideal point. Would the President try to align with the Senate through the use of an administrative agency, the Supreme Court will reverse the President's action, and the House will veto any intent to overrule the Supreme Court action.

Thus, the power to veto provides some power to the President. In our framework, the executive power does not confer the President any particular advantage.<sup>29</sup> It is rather the ability to veto Congressional reversals of Supreme Court decisions that provides the power to affect the equilibrium. Thus, with Presidential veto, the Presidents' preferences matter in determining the long-run political equilibrium.

#### 2.4. COMPARATIVE STATICS

Proposition 3, then, can be used to analyze the comparative statics implications of our model. First, consider a case where the ideal point of the Supreme Court is inside  $W(\cdot)$ . In that case, marginal changes in the ideal points of the President, the House, or the Senate will have no impact on the legislative equilibrium and on the position of the Supreme Court. [Relatively large changes, however, that take the Supreme Court's ideal point outside  $W(\cdot)$  will have an effect on the legislative equilibrium.]

Now let the ideal points of the President and of the Supreme Court be on different sides of the House–Senate contract curve. In that case, the long-run equilibrium is on  $C(H,S)$ , and changes in the position of the President will have no impact on the legislative equilibrium. Instead, only changes in the position of either the House or the Senate imply a change in the long-run political equilibrium.

Consider, finally, the case where the initial long-run equilibrium is on the contract curve involving the President and, say, the House ( $E_1$  in Figure 5). Let the ideal point of the President change, say, away from the ideal point of the Supreme Court. The contract curve between the President and the House also moves away from the Supreme Court. From Proposition 3, the

29. Except in the case of multiple equilibria. See note 21.



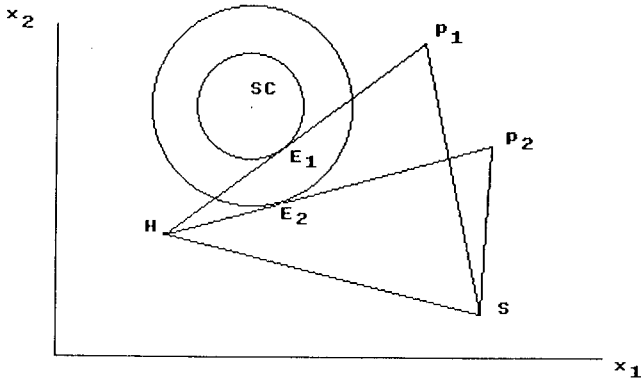


Figure 5. Comparative statics on the President's ideal point. H: ideal point of the House; S: ideal point of the Senate; SC: ideal point of the Supreme Court; P: ideal points of the President.

new long-run equilibrium has to reside on the new contract curve, with the Supreme Court following the electorate (see, however, Proposition 2 above). That is, the long-run equilibrium will follow the move in the preferences of the President.

## 2.5. ALTERNATIVE MODES OF JUDICIAL DECISIONS

A basic assumption in the previous sections is that in interpreting legislative statutes, the Court is free to choose, in principle, any point in the policy space. In this framework, then, the equilibrium consists of a policy outcome such that it maximizes the Court's utility and is in the core of the bargaining game between the House, the Senate, and the President. Thus, the location in the policy space of the administrative agency is irrelevant, as is the nature of the initial legislation enacting the statute. Confronted with a case concerning a particular set of issues, the Court's choice is only a function of its current preferences and of the current political composition of Congress and the executive.

In this section we explore some of the implications of relaxing the assumption that the Court, in making its decisions, can choose any point in the policy space [for a more detailed analysis, see Spiller (1990c)]. In particular, we study the implications for agency discretion of the Court having the power only to reverse or sustain a prior agency decision. The Court, though, in making its decision behaves strategically, considering its impact on the legislative process and on the subsequent policy outcome.

The main result is that while both agency preferences and the location of the initial status quo are important in determining the equilibrium, the Court's preferences are crucial in explaining the behavior of agencies.

Agency discretion, now, is constrained not only by Congressional preferences, but by the preferences of the Court. Nevertheless, the main thrust of the previous sections remains: first, the Court will follow election results as they change the set of feasible legislative decisions; and, second, the Court, while behaving strategically, is not able to impose its preferences, but rather is constrained by the remaining institutions of government.

## 2.6. A MODEL OF AGENCY DISCRETION UNDER JUDICIAL REVIEW WITHOUT PRESIDENTIAL VETO

In the previous sections we have assumed that the President has full control over the administrative agencies. We showed, nevertheless, that if the Court can make decisions on a continuum, then the President has no executive power. That is, Presidential control over the agency does not grant the President any power to affect the long-run equilibrium. In this section we relax both the assumption of full Presidential control over the agency as well as the assumption that the Court can make decisions on a continuum. Following our previous preference assumptions, we assume here that the agency also has well defined and stable preferences over the policy space, represented by strictly convex indifference curves. The agency's ideal point is represented by point A in Figure 6. We assume now that the Court can only reverse or sustain a prior administrative agency decision.

These assumptions change slightly the game analyzed in the previous sections. The game now has four stages. In the initial stage certain legislation is passed, which determines the initial status quo (represented by  $x_0$  in Figure 6). In the second stage the agency moves by implementing the statute and choosing a point (represented by  $x_1$ ). In the third stage the Court reviews the agency's decision. The Court can either reverse or sustain the agency decision. If the Court reverses the agency decision, it upholds the initial status quo,  $x_0$ . If the Court sustains the agency decision, then the new status quo becomes  $x_1$ . In the fourth stage, Congress considers the Court's decision. The Court's decision, then, determines the relevant status quo at the fourth stage. Let the Court decision be given by  $Z(x_0, x_1)$ . If Congress wants to reverse the Court's decision, it can do so only by making both houses of Congress better off. That is, as in the previous version, reversals of the Court decision will only be undertaken if the Court's decision,  $Z(x_0, x_1)$ , is not in  $C(H, S)$ . Congressional bargaining, however is not unconstrained. Let  $G(x)$  represent the deterministic outcome to a bargaining process when  $x$  is the status quo. Thus, if  $y \in C(H, S)$ , then  $y = G(y)$ .

We solve this model backward, by analyzing first the Congressional action that will follow a previous decision by the Court. From our previous discussion, we have that if  $Z(x_0, x_1)$  is in  $C(H, S)$ , then the Court's decision becomes the equilibrium. If, however,  $Z(x_0, x_1)$  is not in  $C(H, S)$ , then  $G(Z(x_0, x_1))$

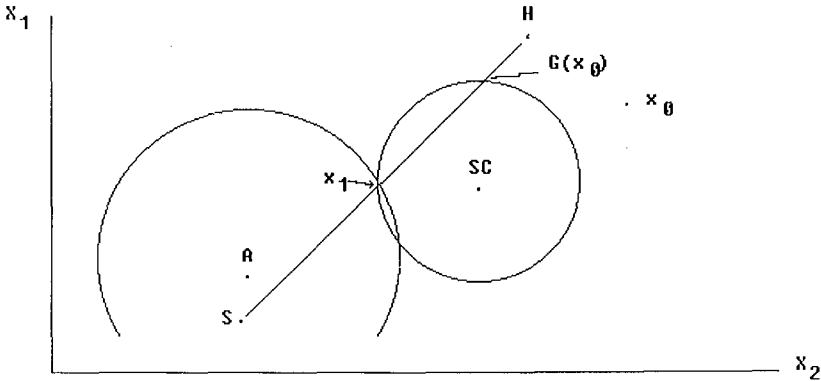


Figure 6. Agency discretion in a two-dimensional model without Presidential veto.  $x_0$ : initial status quo;  $x_1$ : agency's decision; SC: ideal point of the Court; H: ideal point of the House; S: ideal point of the Senate;  $G(x_0)$ : Congressional bargaining outcome starting from  $x_0$ .

becomes the equilibrium. When the Court makes its decision, it will consider the optimal response of the legislature. In analyzing the equilibrium, we have to consider two alternative cases, depending on whether the initial legislation is in  $C(H,S)$ , that is, on whether the composition of the current Congress resembles that of the enacting Congress or not. Letting  $A(x)$  and  $SC(x)$  represent those points preferred to  $x$  by the agency and the Court, respectively, the following proposition presents the basic results.

*Proposition 4.* (a) If  $x_0 \in C(H,S)$ , then (i) if  $A(x_0) \cap SC(x_0) \cap C(H,S) = \emptyset$ , then  $x_0$  remains the equilibrium; and (ii) if  $A(x_0) \cap SC(x_0) \cap C(H,S)$  is not empty then the equilibrium is that point in  $SC(x_0) \cap C(H,S)$  that maximizes the utility of the agency.

(b) If  $x_0 \notin C(H,S)$ , then (i) if  $A(G(x_0)) \cap SC(G(x_0)) \cap C(H,S) = \emptyset$ ,  $G(x_0)$  is the equilibrium; and (ii) if  $A(G(x_0)) \cap SC(G(x_0)) \cap C(H,S)$  is not empty, then the equilibrium is the point in  $SC(G(x_0)) \cap C(H,S)$  that maximizes the utility of the agency.

Proposition 4 says that if the current Congress resembles the enacting Congress, then if the preferences of the Court and the agency are such that each prefers moving the initial status quo in different directions along  $C(H,S)$  [i.e.,  $A(x_0) \cap SC(x_0) \cap C(H,S) = \emptyset$  means that the projection of the ideal points of the agency and the Court onto  $C(H,S)$  are on opposite sides of  $x_0$ ], then the initial status quo remains the equilibrium. If, however, both the agency and the Court prefer moving the initial status quo in the same direction along the contract curve between the House and the Senate, then the agency will pick a point, such that it will not be reversed by the Court,

and such that the point will maximize the agency's utility. Finally, if the initial legislation is not in  $C(H,S)$ , perhaps resulting from a change in the composition of Congress, then the same analysis can be carried out replacing  $x_0$  by  $G(x_0)$ .

To prove the proposition consider the case where  $x_0 \in C(H,S)$  and where there are no points in the current contract curve preferred by both the Court and the agency to  $x_0$ . Assume that the agency makes a decision,  $x_1$ , which is not  $x_0$  [it may or not be in  $C(H,S)$ ], and such that it prefers  $G(x_1)$  to  $x_0$ . Observe that, by assumption,  $x_0$  is preferred by the Court to  $G(x_1)$ . The Court can either uphold or reject the administrative decision. If it upholds the agency's decision, then the equilibrium will become  $G(x_1)$  [which could be  $x_1$  if  $x_1 \in C(H,S)$ ]. If, however, the Court reverses it, then the equilibrium becomes  $x_0$ . The Court's decision will depend on whether the Court prefers  $G(x_1)$  to  $x_0$  or not. In the current case, however, since there are no points on  $C(H,S)$  that make both the Court and the agency better off than  $x_0$  does, the Court prefers  $x_0$  to  $G(x_1)$ . Thus, if the agency's decision is not  $x_0$ , the Court will reverse it. Thus, the only long-run equilibrium is  $x_0$ .

If, however, there are points along the contract curve that can make both the agency and the Court better off than the initial legislation,  $x_0$  [i.e.,  $A(x_0) \cap SC(x_0) \cap C(H,S)$  is not empty, meaning that the projections of the ideal points of the Court and the Agency onto  $C(H,S)$  are in the same direction from  $x_0$ ], then the equilibrium is given by that point along  $C(H,S)$  that will not be reversed by the Court [i.e., it belongs to  $SC(x_0) \cap C(H,S)$ ], and that maximizes the utility of the agency. To see this point observe that the Court will not reverse any decision in  $C(H,S)$  that it prefers to  $x_0$ , nor will Congress reverse any Court decision that leaves the legal status quo in  $C(H,S)$ . Thus, the agency has the discretion of choosing among those feasible policies that the Court prefers to the status quo. It will then choose that point that maximizes its own utility subject to leaving the Court at least as well off as with the original legislation,  $x_0$ . This shows the first part of Proposition 4. Similar reasoning will show the second part of the proposition. All that is needed is to understand that if  $x_0$  is not in  $C(H,S)$ , then  $x_0$  is not a credible legislative threat. Instead,  $G(x_0)$  is the credible legislative threat.

Figure 6 presents a case where  $x_0$  is not in  $C(H,S)$ . We observe that the fact that the Court can reverse the agency's decision, and thus trigger Congressional action towards  $G(x_0)$ , restricts the set of feasible agency decisions.

## 2.7. A MODEL OF AGENCY DISCRETION UNDER JUDICIAL REVIEW WITH PRESIDENTIAL VETO

In the previous section we assumed that the President cannot sustain a veto. In this section we extend this analysis to allow for a more active role by the President. We model the role of Presidential veto in the same way we did

before, that is, by requiring all legislative outcomes to be the result of a bargaining game among the House, the Senate, and the President. All that can be said of this bargaining process is that it has to be efficient and that it cannot make any of the three players worse off than the initial status quo. Unconstrained bargaining, then, will imply an outcome in the area delineated by the contract curves between the three players. Again, let that area be  $W(H,S,P)$ .

As in the previous section, let  $G(x)$  represent the equilibrium to the bargaining game when the status quo is  $x$ . thus, if  $y \in W(H,S,P)$ , then  $y = G(y)$ .

As before, the introduction of the President changes the last stage of the game. Now, it is not only Congressional action that is necessary to reverse a decision by the Court, the President's actions have to be considered as well. As before, there are two basic types of equilibria to this game, depending on whether the current political composition resembles that of the enacting Congress and President, that is, whether  $x_0$  is in  $W(H,S,P)$ . Proposition 5 presents the main results.

*Proposition 5.* (a) If  $x_0 \in W(H,S,P)$ , then (i) if  $A \in W(H,S,P) \cap SC(x_0)$ , then  $A$  is the long-run equilibrium; and (ii) if  $A \notin W(H,S,P) \cap SC(x_0)$ , then the equilibrium is that point in  $W(H,S,P) \cap SC(x_0)$  that maximizes the agency's utility.

(b) If  $x_0 \notin W(H,S,P)$ , then (i) if  $A \in W(H,S,P) \cap SC(G(x_0))$ , then  $A$  is the long-run equilibrium; and if (ii)  $A \notin W(H,S,P) \cap SC(G(x_0))$ , then the equilibrium is that point in  $W(H,S,P) \cap SC(G(x_0))$  that maximizes the agency's utility.

The proof of the proposition is straightforward, following the same reasoning as that of Proposition 4; thus it is not presented here. Figure 7 shows such a case. Observe that the fact that the Court may reverse the agency restricts the policy outcomes in  $W(H,S,P)$  that the agency can actually implement. In Figure 7, the agency cannot deviate too much from the status quo without triggering a reversal by the Court, which will be sustained by Congress and the President.

To summarize, when the Court can only reverse or sustain an agency decision, the agency has substantially more discretion than when the Court can choose, in principle, any point on the policy space. The Court will not support the legislative status quo in all cases, as changes away from the status quo may make the Court and the agency better off. The Court, on the other hand, will sustain the status quo when the agency's interests would move the policy away from the direction most preferred by the Court. Thus, the main thrust of the previous sections remains here as well. In particular, the Court follows election results as they change the set of feasible legislative decisions. Also, the Court, while behaving strategically, is not able to impose its preferences, but rather is constrained by the other institutions of govern-

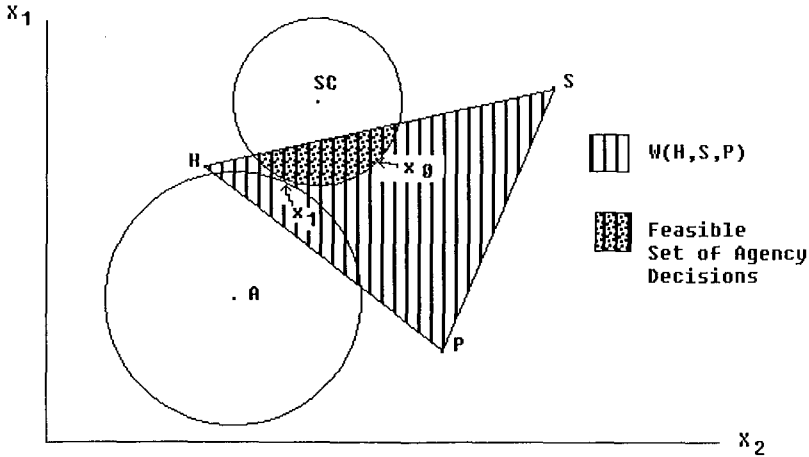


Figure 7. Agency discretion in a two-dimensional model with Presidential veto.  $W(H,S,P)$ : feasible set of Congressional decisions;  $S$ : ideal point of the Senate;  $H$ : ideal point of the House;  $A$ : ideal point of the agency;  $SC$ : ideal point of the Court;  $x_0$ : initial status quo;  $x_1$ : agency's decisions.

ment. Finally, since casual observation of Supreme Court decisions shows that the Court makes decisions under both modes of behavior, the conditions for their relevance remain to be determined both theoretically and empirically.

### 2.8. SUMMARY

It is worth summarizing now some of the main empirical implications of our framework concerning the rendering of statutory opinions by the Court. First, changes in Supreme Court statutory interpretations should follow changes both in the preferences of members of Congress (and in particular, of those in the relevant committees) and in the composition of the Court. Furthermore, our model implies that the Court's statutory interpretations should not be very sensitive to Presidential preferences. Finally, our theory implies that Court decisions should be followed by legislative inaction. Congressional reversals, if any, should only follow unexpected changes in the composition of Congress. Thus, our theory can be empirically refuted.

In a sense, causal empiricism has already rejected the theory, as, on occasion, Supreme Court decisions have been reversed during the same Congressional term. For example, the Court's decision in *General Electric v. Gilbert*, 429 U.S. 125 (December 7, 1976), was reversed (in 1978) by the Congress that was elected *before* the Court's actual decision. Similarly, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), was reversed by the same Congress in 1980. As with every theory, however, ours deals with general tendencies, and thus a more appropriate test of the theory is whether most reversals develop during the same Congress or following Congressional

changes. An empirical test of our approach along these lines, however, is beyond the scope of this article.

In the following sections we use the framework developed above to analyze two Supreme Court cases. Since the purpose of this exercise is not to provide a legal analysis of those cases, but rather to provide consistent self-interest rationales for these Supreme Court decisions, the ensuing analysis will be based exclusively on considerations arising from our framework, and will not take into account potentially important legal considerations. Furthermore, since the location of the Supreme Court has to be identified as part of the analysis, this exercise provides a feasible consistency test of our theory, as analyses of cases involving related issues could, in principle, imply quite different locations for the Court, providing then a refutation of the theory. While the following analyses of specific cases do not constitute a test of our theory, they are useful in showing the potential empirical relevance of this approach, and in providing new insights on two important judicial controversies.

### 3. THE STATE FARM CASE

This case is an example of the Court reducing the ability of the President to affect policy through administrative agencies.

Involved in this case is the extent of the National Highway Traffic Safety Administration's (NHTSA's) authority to rescind a previously issued standard. On June 24, 1983, the Supreme Court issued its opinion in *Motor Vehicle Manufacturers Association of the United States, Inc. et al. v. State Farm Mutual Automobile Insurance Co. et al.*<sup>30</sup> The Court held that the NHTSA's rescission of the passive restraint requirement in Modified Standard 208 (requiring the installation of passive restraints in new vehicles) was arbitrary and capricious. The agency, according to the Court, failed to present an adequate basis and explanation for rescinding the requirement and had to either consider the matter further or adhere to or amend the Standard along the lines that its analysis supports.<sup>31</sup>

Let us first discuss the events that preceded the *State Farm* decision. In 1966 Congress enacted the National Traffic and Motor Vehicle Act (1966 Act), with the purpose of reducing "traffic accidents and deaths and injuries to persons resulting from traffic accidents."<sup>32</sup> The Act directs the Secretary of Transportation or his delegate to issue motor-safety standards that "shall be practicable, shall meet the need for motor safety, and shall be stated in

30. 463 U.S. 29 (1983).

31. *Id.* p. 34.

32. 15 U.S.C. § 1381.

objective terms.”<sup>33</sup> The Secretary of Transportation delegated this authority to the NHTSA.

Under the authority of the Act, the Department of Transportation issued, in 1967, Standard 208, which at that time simply required the installation of seat belts in all automobiles.<sup>34</sup> Having noticed a low level of seat-belt usage, the Department started to consider the possibility of requiring “passive occupant restraint systems.” After some discussion, the Department revised Standard 208 to include passive protection requirements.<sup>35</sup> Two years later, in 1972, the agency amended the Standard to require full passive protection for all front-seat occupants of vehicles manufactured after August 15, 1975. The two types of passive restraints considered were automatic seat belts and air bags. Vehicles built between August 1973 and August 1975 were to carry either passive restraints or lap and shoulder belts coupled with an “ignition interlock” that would prevent starting the vehicle if the belts were not connected.

The ignition interlock option proved to be very unpopular and Congress in 1974 amended the Act to prohibit a motor-vehicle safety standard from requiring or permitting compliance by means of an ignition interlock or a continuous buzzer designated to indicate that safety belts were not in use. The 1974 amendments also provided veto power to Congress for any safety standard that could be satisfied by a system other than seat belts.<sup>36</sup>

In 1976, the Secretary of Transportation suspended the passive restraint requirement, arguing that there would be widespread resistance to the new system.<sup>37</sup> Months later, however, a new Secretary issued, in 1977, a new mandatory passive restraint regulation, known as Modified Standard 208.<sup>38</sup> As modified, the Standard required the installation of air bags or passive seat belts. During the following three years, Modified Standard 208 survived both judicial and Congressional scrutiny.<sup>39</sup>

33. In issuing these standards, the Secretary or his delegate is directed to consider “relevant available motor vehicle safety data,” whether the proposed standard is “reasonable, practicable, and appropriate” for the particular type of motor vehicle for which it is prescribed, and “the extent to which such standards will contribute to carrying out the purposes of the Act.” 15 U.S.C. §1392(a), (1976 ed. Supp. V), and 15 U.S.C. §1392(f)(1),(3),(4).

34. 32 *Fed. Reg.* 2415.

35. 34 *Fed. Reg.* 11,148 (July 2, 1969).

36. Motor Vehicle and School Bus Safety Amendments of 1974, Pub. L. 93-492, §109, 88 Stat. 1482, 15 U.S.C. § 1410(b), and § 1410 (B)(2).

37. Rule-making opening reported at 41 *Fed. Reg.* 24,070 (June 14, 1976). Final decision reported at Department of Transportation, The Secretary’s Decision Concerning Motor Vehicle Occupant Crash Protection (December 6, 1976) (Coleman decision) Joint Appendix (J.A.) 2065.

38. 42 *Fed. Reg.* 34,289 (1987); 49 C.F.R. §571-208 (1978).

39. For example, in *Pacific Legal Foundation v. Department of Transportation*, the Court of Appeals upheld Modified Standard 208 as rational, nonarbitrary regulation consistent with the agency’s mandate under the act [193 U.S. App. D.C. 184, 593 F.2d. 1338, cert. denied. 444 U.S. 830 (1979)]. The Supreme Court denied certiorari of the Court’s of Appeal’s decision.



With the Reagan administration coming to power, a new perspective on regulatory reform was introduced. A central concern of the administration was the simplification of administrative rules implementing regulatory statutes, including the rescission of the passive restraint standard. Since it was apparent that the House of Representatives, dominated by Democrats, would not go along with the President's intent, the Administration started to implement policy changes through the administrative route.<sup>40</sup>

Thus, in February 1981, Secretary of Transportation Andrew Lewis reopened the rule-making and argued that a one-year delay was necessary because of the "dramatic changes in the production plans for the 1982 model fleet," and because, "the economic and other justifications for the existing phase-in scheduling have changed dramatically since the standard was adopted in 1977."<sup>41</sup> The delay was also needed, Lewis argued, to allow NHTSA officials time to reexamine the entire passive restraint issue.<sup>42</sup>

Shortly thereafter, the NHTSA issued a final rule (Notice 25), rescinding the passive restraint requirement as contained in Modified Standard 208. In explaining the rescission, NHTSA maintained that it was no longer able to find, as it had when the Standard was issued, that the automatic restraint requirement would produce significant safety benefits.<sup>43</sup>

In holding that the rescission of modified Standard 208 was arbitrary and capricious, the Supreme Court noted that the rescission of a standard must pass the same degree of scrutiny by the judiciary as would the enactment of a new regulation. The Court found that NHTSA had failed to present an adequate basis and explanation for rescinding the requirement, and ordered it to consider the matter further or to adhere to or amend the Standard along the lines which its analysis supported previously.<sup>44</sup> It is worth investigating,

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Similarly, the Modified Standard also survived congressional scrutiny. Congress failed to exercise its authority under the legislative veto provision of the 1974 Amendments. While no action was taken by the full House of Representatives, the Senate Committee with jurisdiction over NHTSA affirmatively endorsed the Standard [S. Rep. No. 95-481 (1977)]. Several other rulings dealing with Modified Standard 208 were considered during the next several years. For example, on May 22, 1978, a notice of proposed rule-making was issued in response to a petition from General Motors requesting more flexibility in the design of emergency-release mechanisms for automatic seat belts [43 *Fed. Reg.* 21912 (May 22, 1978)]. NHTSA granted the proposal six months later [43 *Fed. Reg.* 52493 (November 13, 1978)].

40. See, for example, Thomas, Wildemann, and Brown.

41. 46 *Fed. Reg.* 53,420 (1981).

42. As part of his proposal, however, Lewis prepared three alternative amendments to the rule: (a) reversing the order of compliance, so that small cars were to be equipped first; (b) requiring all cars to comply with the standards by March 1983; or (c) rescinding the Standard altogether. See Thomas, Wildemann, and Brown.

43. In addition, given the low benefit-cost ratio arising from the analysis of this requirement, NHTSA feared that Modified Standard 208 would be regarded as an instance of ineffective regulation [46 *Fed. Reg.* 53,419 (October 29, 1981)].

44. Some legal scholars suggest that the Supreme Court decision did not simply imply the application of a standard precedent rule, as before the Supreme Court decision it may have

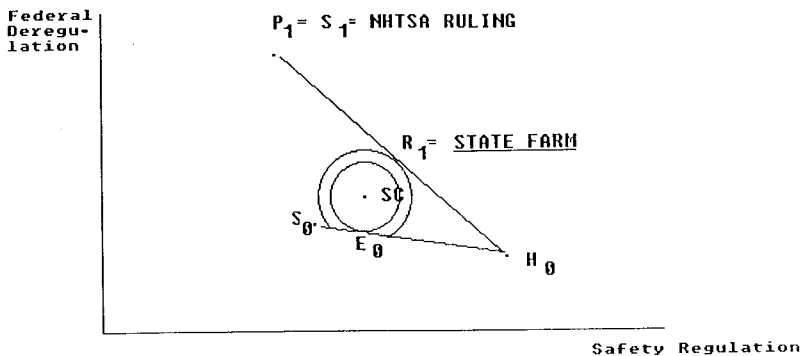


Figure 8. The *State Farm* case.  $E_0$ : initial status quo;  $R_1$ : Supreme Court's *State Farm* decision;  $H_0$ : ideal point of the House;  $S_0$ : ideal point of the Senate pre-1980;  $S_1$ : ideal point of the Senate post-1980;  $P_1$ : ideal point of the President post-1980.

however, whether there is a political-economic rationale for the decision.

Figure 8 is a graphic description of these events as they would be interpreted by the model in this article. We first identify the dimension or issues involved in the case. In *State Farm*, the Court confronted two issues. The issue of immediate attention was the validity of Modified Standard 208, and thus the extent of safety regulation in the automobile industry. A different issue was the extent by which the President can deregulate via administrative rules without the explicit consent of other branches.

Having defined the dimensions, we need next to define the relevant ideal points for the President, Congress, and the Supreme Court. The President's position is not difficult to locate, since President Reagan was very vocal about his preferences. The new Administration's preferences called for a substantial reduction in safety regulation, and also for administrative deregulatory power.

The House's and the Senate's preferences, before 1980, were in the other direction. We focus on the chairs of the committees with jurisdiction over motor-vehicle safety. In the Senate, the relevant committee was the Commerce Committee (later named the Commerce, Science, and Transportation Committee). From 1966 to 1979, the committee was controlled by Democrats. Up to 1976, Senator Magnuson (D, Washington) was the committee chair. As revealed by bills that Senator Magnuson introduced during his tenure in Congress, he was in favor of extensive government safety regula-

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been uncertain whether the administrative elimination of a regulation should be held to the same standards as their introduction. See Garland. Others, however, see no new legal ground on *State Farm*, but rather the intent to erase a new legal ground developed in the D.C. Court of Appeals in the decision below. We thank Jerry Mashaw for suggesting this to us.

tion.<sup>45</sup> The preferences of the rest of the members of the Senate are expected to be at least in the same direction as those of Senator Magnuson.

In 1981, however, there was a change in the dominating preferences in the Senate. The new chairman of the Commerce Committee, Senator Packwood (R, Oregon), showed different preferences. By analyzing some of his legislative efforts during this period, we can see that Packwood supported more federal deregulation and, to some extent, less safety regulation than his predecessors.<sup>46</sup>

The House committee with jurisdiction over the relevant issue was the committee on Interstate and Foreign Commerce. From 1966 to 1980, R. Staggers (D, West Virginia) acted as committee chairman. In 1981, however, the jurisdiction over motor-vehicle safety was given to the committee on Energy and Commerce, under the chairmanship of R. Dingell (D, Michigan). Both, Dingell and Staggers, were supporters of government safety regulation.<sup>47</sup> Thus, as depicted in Figure 8, the preferences of the House, both before and after 1980, are for less federal deregulation and more extensive safety regulatory provisions than the Senate.<sup>48</sup> The contract curve connecting  $H_0$  and  $S_0$  represents the political configuration pre-1980, with  $E_0$  representing the Modified Standard 208. Following the 1980 election, there is a new contract curve, with the Senate moving away from the House. The main change in the Senate's ideal point (and thus in the contract curve) is along the Federal Deregulation dimension.<sup>49</sup> Similarly, the new President moves with the Senate. For simplicity, we assume that the ideal points of the Senate and the President are the same. The change in the political configuration undermines the long-run equilibrium nature of the status quo. In the short run, however, before the Supreme Court acts, the President can try to "pull" the policy outcome toward his ideal point, even though the House will block any detrimental change to the current legislation. The opening of the rule-making by Secretary Lewis in 1981, and the rescission of Modified Standard 208, can be interpreted in this way.  $(P_1S_1)$  in Figure 8 represents

45. For example, § 1883 (1976) (directing the Secretary of Transportation to issue standards for fuel economy performance); § 1302 (1976) (to promote safety and health in the mining industry).

46. § 2038, for example, introduced in the 98th Congress, provided for the deregulation of the trucking industry.

47. While Rep. Dingell may have been an outspoken critic of motor-vehicle regulation, he was in favor of safety regulation, as his sponsoring of the 1983 seat-belt bill (H 4175, 95th Congress), providing for an extensive use of seat belts, shows. See also, H 14,256 (96th Congress) providing for an increase in consumer protection in relation to drugs and cosmetics. His support for safety regulation, however, should not imply that Rep. Dingell was not supporting his constituents (Michigan automobile companies and workers), as some have speculated that safety regulation provided advantages to the domestic car manufacturers vis-à-vis Japanese producers.

48. Since less-populated states have a relatively larger representation in the Senate than in the House, it is reasonable to predict that the Senate will usually be less supportive of regulatory measures than the House. See, McCubbins, Noll, and Weingast (1989).

49. Thus, we should expect the main change in the long-run equilibrium to be along that dimension as well.

Table 1. Bills Introduced to Amend the NTMV Act of 1966

Date and title	Sponsor	Summary
April 10, 1981; H 3237	Wirth (D)	To amend the NTMV Act of 1966 to require the installation of passive restraint systems in small new cars
October 26, 1981; S 1773	Danforth (R)	To amend the NTMV Act of 1966, to require from all car manufacturers the installation of automatic crash protection systems in new passenger cars
November 24, 1981; S 1887	Danforth (R)	To amend the Internal Revenue Code to encourage the use of air bags, allowing manufacturers to claim a refundable tax credit for the installation of air bags in 1984 and beyond, and imposing an excise tax on new cars without this technology
February 15, 1983; S 477	Danforth (R)	To amend the Internal Revenue Code of 1954 and the NTMV Act of 1966 to expedite the installation of automatic safety air bags
April 21, 1983; H 2693	Lantos (D)	To enact the Highway Safety Act of 1983
October 20, 1983; H 4175	Dingell (D)	To amend the NTMV Act of 1966 to provide for more extensive use of safety-belt systems in passenger motor vehicles, in order to assist in reducing health, disability, and other costs
June 28, 1984; S 2828	Moynihan (D)	To amend the NTMV Act of 1966 to require the provision of automatic safety air bags in all automobiles, beginning on or after September 1, 1986

the NHTSA's ruling. Since at  $S_1$  the Senate is at its ideal point, it will block any new legislation that may alter the NHTSA's position.<sup>50</sup>

Several bills were introduced in Congress shortly after the February 1981 announcement and before the *State Farm* decision. As expected by our framework, however, none of those legislative initiatives were acted upon. (See Table 1.)

The NHTSA's decision, then, allowed the Senate to achieve an outcome close to its ideal point without having to get directly involved in the enactment of legislation.

At the time of the *State Farm* decision, then, the situation can be described as follows: an agency decision has modified the status quo, and has tilted the balance of power in favor of the Senate, creating a stalemate in legislative action. It is at this point that we would expect the Supreme Court to, opportunistically, enter a decision to restore a policy closer to the previous status quo.

50. Furthermore, since the NHTSA's ruling will not be supported by the House, we would not expect the Senate to promote new legislation to make the NHTSA position part of the legal standard.

For the *State Farm* decision to be in the Court's self-interest, it has to be the case that its ideal point is not to the northwest of the new ideal point of the Senate. If that would be the case, then the Supreme Court's position would be improved by the NHTSA's ruling, and hence it should have upheld it rather than reversed it. Observe, however, that a position northwest of the new ideal point of the Senate implies a very conservative court, as it would prefer very little safety regulation and substantial federal deregulatory powers. We assume, then, that the position of the Court concerning safety issues and federal deregulatory powers is in between those of the House and the new Senate.<sup>51</sup>

$R_1$ , in Figure 8, represents the *State Farm* case.  $R_1$  is more in tune with what the status quo was before 1980, since it moves the status quo away from  $S_1$  towards  $H_0$ .

In deciding whether the NHTSA's rescission of the passive standard requirement was proper, the Court had to determine first what standard of review to apply in general to administrative rulings. As mentioned above, the Court held that a rescission of a rule is subject to the same standard of judicial review, "the arbitrary and capricious standard," as is the promulgation of a new rule. Since the NHTSA failed to supply a reasoned analysis justifying the change in policy, it did not satisfy the quasiprocedural elements of the doctrine.<sup>52</sup> Thus, while restraining the agency on its current deregulatory process, the Court allowed some extent of administrative deregulatory power, as long as it held to the same standards as the introduction of new administrative rules.

To summarize, in *State Farm* the Supreme Court used a procedural standard to reverse an administrative deregulatory initiative that, following a change in only one house of Congress, would have shifted public policy too far away from its most preferred point on the new contract curve between the House and the Senate.

#### 4. THE GROVE CITY CASE<sup>53</sup>

The Supreme Court decision in *Grove City*, on February 28, 1984, involved the power of the Department of Education under Title IX of the Education

51. By 1983 there was already a majority, albeit narrow, of Republican-appointed justices. This narrow majority, however, was essentially the same since 1975. Observe, also, that the Court could have been located to the southeast of the ideal point of the House. But then the equilibrium would have been a corner solution, namely, the ideal point of the House.

52. Furthermore, the agency also seems to have violated the substantive elements of the doctrine in at least two respects: (a) lack of records in support of its findings of fact; and (b) failing to establish a reasonable relationship between its decision, on the one hand, and the relevant evidence, alternatives, and statutory purpose, on the other. Garland (p. 546).

53. *Grove City College v. Bell*, 465 U.S. 555 (1984). For a different political-economic analysis of this case, see Marks.

Amendments of 1972.<sup>54</sup> The 1972 amendments prohibit employment discrimination on the basis of sex in educational institutions receiving federal funds. The issue at hand was the determination of the appropriate scope of the Department of Education's enforcement powers under Title IX.

The two sections relevant here are Sections 901 and 902. Section 901 prohibits discrimination on the basis of sex by any education program or activity receiving federal assistance. Section 902, the enforcement provision for Section 901, provides, in its pertinent parts, that compliance may be effected by, among other alternatives, "the termination of or refusal to grant or to continue assistance under such program or activity to any recipient . . . , but such termination or refusal shall be limited in its effect to the particular program, or part thereof, in which noncompliance has been so found."<sup>55</sup>

The plain language of Section 902 appears to indicate a program-specific type of enforcement. However, there has been extensive debate on the meaning of Section 902. Marks (1988) argues that an examination of the legislative history of the Act points toward the conclusion that an institution-wide type of enforcement provision was intended. It has also been forcefully argued, however, that a program-specific enforcement provision is more truthful to Congressional intent.<sup>56</sup>

Not only has there been debate at the Congressional level on the meaning of Section 902, but courts have struggled with the issue as well. Several federal courts have decided in favor of an institution-wide enforcement provision. One such example is *Haffer v. University*, involving an athletic program that did not receive earmarked funds covered under Title IX.<sup>57</sup> Several other cases have followed the same approach when deciding the appropriate enforcement type for other antidiscrimination statutes.<sup>58</sup> On the other hand, several other courts have interpreted the enforcement provisions of antidiscrimination statutes as program-specific.<sup>59</sup>

54. In 1972 the Higher Education Act was enacted into law as the Education Amendments of 1972. Pub. L. 92-318, Title IX, § 902, 86 Stat. 373, 20 U.S.C. § 1682.

55. *Id.*

56. Garvey, for example, examines the language of several antidiscrimination statutes that used language similar to that of Title IX. He concludes that the current language of Title VI of the Civil Rights Act of 1964, Title IX, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 all support a program-specific enforcement provision. Each of the statutes begin with a prohibition against discrimination in any "program or activity receiving Federal financial aid" and then proceed to make clear that the phrase "program or activity" means something less than "recipient," "educational institution," or "political entity."

57. 524 F. Supp. 531 (E.D. Pa. 1981), affirmed 688 F. 2d. 14 (3rd Cir. 1982).

58. As to § 504: *Wolff v. South Colonie School District*, 534 F. Supp. 758 (N.D.N.Y. 1982) (school trips covered). As to Title VI: *Board of Public Instruction of Taylor Co. v. Finch*, 414 F. 2d. 1068 (5th Cir. 1969) (assumes institutional-wide coverage); *United States v. Jefferson Co. Board of Education*, 372 F. 2d. 836 (5th Cir. 1966), affirmed en banc, 380 F. 2d. 385, cert. denied subnom; *Caddo Parrish Board of Education v. United States*, 389 U.S. 840 (1967) (Title VI institution-wide desegregation order appropriate).

59. For example, *Hillsdale College v. Department of Health, Education and Welfare*, 696 F. 2d. 418 (6th Cir. 1981) (the entire college as an institution was not a "program within the

Notwithstanding this debate over the interpretation of the enforcement provision, the preferences of the committees with jurisdiction over this issue in both houses can be clearly defined. Marks shows that up to 1980 the House committee on Education and Labor had stable preferences. The average mean ADA score of the Democratic committee members was relatively high (a liberal vote on the issue of enforcement is one in favor of institution-wide coverage). During this same period similar tendencies dominated the Senate committee on Labor and Human Resources. Not only did a Democratic majority control the committee, but in addition the ranking minority member of the committee, Republican Jacob Javits, was a principal sponsor of the original legislation and a supporter of institution-wide termination.<sup>60</sup>

Thus, until 1980, the status quo could be understood as requiring institution-wide enforcement.  $E_0$  in Figure 9 represents this policy outcome. We assume that until 1980 the ideal points of both houses of Congress were very close in the policy space, both supporting institution-wide enforcement.  $E_0$  is assumed to be on the contract curve  $C(H, S_0)$ , where  $H$  and  $S_0$  represent the House and Senate ideal points.

In 1980 a change in the political composition of Congress opened an opportunity for the Supreme Court to alter strategically the status quo. Although the Education and Labor Committee of the House continued to be controlled by Democrats (thus, we keep the ideal point of the House at  $H$ ), the Senate experienced a large change. A Republican majority now dominated the Committee on Labor and Human Resources, with the consequent change in committee preferences. Marks shows that the mean ADA legislative scores for the Senate committee under Republican domination was lower than the committee mean under Democratic domination. Furthermore, the new chairman of the Senate committee, Senator Hatch, was a strong supporter of program-specific enforcement.

This change in the political configuration is represented in Figure 9 by the new contract curve  $C(H, S_1)$ . The Court is now before a divided Congress.

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meaning of Title IX"), vacated and remanded, 466 U.S. 901 (1984); *Rice v. President & Fellows of Harvard College*, 663 F.2d. 336 (1st Cir. 1981) (allegation that the law school at the college in question received federal funds for its work-study program, without allegation of sex discrimination in school's handling of that program, was insufficient to invoke the protection of the Education Amendments of 1972); *Dougherty County School Sys. v. Harris*, 622 F.2d 735 (5th Cir. 1980) (Title IX does not authorize Secretary to terminate all federal aid because of any discrimination in a school system if the federally assisted programs are administered impeccably); *Romeo Community Schools v. United States Department of Health, Education, and Welfare*, 600 F.2d 581 (6th Cir. 1979) (Title IX applies only to students involved in programs or activities receiving federal financial assistance and does not apply additionally to employees of educational institutions receiving such assistance), cert. denied, 444 U.S. 972 (1979).

60. Marks also analyzes the length of continuous service to show the importance of these legislators.

Trigger  
Clause

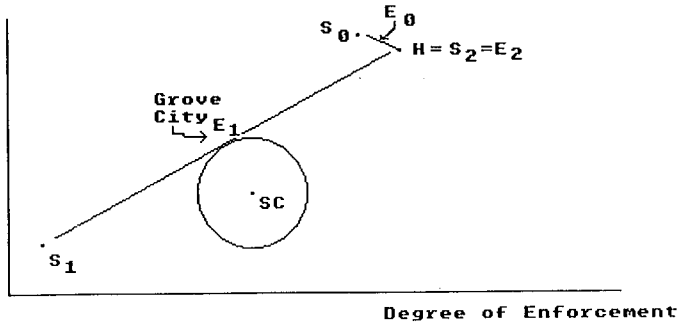


Figure 9. The *Grove City* case. SC: ideal point of the Supreme Court;  $E_1$ : *Grove City* decision; H: ideal point of the House;  $S_0$ : ideal point of the Senate pre-1981;  $S_1$ : ideal point of the Senate post-1980 elections;  $S_2$ : ideal point of the Senate post-1986 elections;  $E_0$ : pre-1980 equilibrium;  $E_2$ : post-1986 equilibrium.

Since the House has not changed, the bargaining set is very small (not depicted in Figure 9 to avoid excessive clutter). Thus, major legislation will not come out of that Congress. On the other hand, the Senate will support any change in the status quo that the Supreme Court would like to undertake.

For the Court to support changing the status quo, it cannot be the case that the Court is to the northeast of the ideal point of the House. That is, the Court cannot have a more liberal view than the House, as in that case the initial status quo would still represent the long-run equilibrium. As in *State Farm*, we will assume that the Court is located between the ideal points of the House and of the new Senate. If that is the case, then, our model would predict a change in the status quo.

Shortly after the change in the control of the Senate, in 1981, the Court granted certiorari to consider *North Haven Board of Education v. Bell*.<sup>61</sup> This case involved the validity of Title IX regulations promulgated by the Department of Education. These regulations prohibited federally funded education programs from employment sex discrimination. Although the issue of the enforcement provision of Title IX was not directly involved, *North Haven* gave an opportunity to the Court to signal its desire to clarify the debate, by intervening directly, if necessary. *In dicta*, the Court expressed its opinion to the fact that an examination of Title IX's language, as well as of its legislative history, corroborates a program-specific type of enforcement.<sup>62</sup>

While the Court was considering the interpretation of Title IX, several bills and resolutions were being introduced in Congress on the same issue.

61. 456 U.S. 511 (1982), cert. granted 450 U.S. 909 (1981).

62. *North Haven*, 456 U.S. 511, 537.



Apart from their legislative purpose, these bills may have served to communicate to the Court the different houses' preferences on this issue.<sup>63</sup>

In *Grove City* the Court went on to make *North Haven's dicta* the main ruling of the case. Although deciding in favor of a broad triggering clause (i.e., that any kind of financial aid even if given directly to students would trigger Title IX coverage), the Court held that the enforcement provision of Title IX was intended to be program-specific.

As argued above, following a drastic change in the preferences of one of the houses of Congress (in this case, the Senate), we would expect the Court to intervene. The intervention of the Court would bring a new policy outcome, which may well be outside the bargaining area between the Senate and the House. In fact, this is the case with *Grove City*. Program-specific enforcement had been the kind of enforcement Senator Hatch signaled to the Court as the Senate's preference. While the Court decided against a broad triggering clause, it sided with Hatch in the most relevant issue. Thus, again, the Court followed the electorate.<sup>64</sup>

Following *Grove City*, several other bills were introduced both in support of and against the Court's decision. As predicted by our model, no legislation came out before the new Congress.<sup>65</sup>

In 1986 the Democrats regained control of the Senate, while the Executive remained Republican. It is reasonable to assume that the new position of the Senate was almost identical to that of the House. Thus, the contract curve between the House and the Senate collapses to point  $H = S_2$ , with  $H = S_2$  also becoming the new long-run equilibrium. After this drastic

63. In June 11, 1981, Senator Hatch, now Chairman of the Senate Committee on Labor and Human Resources, introduced § 1361 to reinforce the program-specific nature of Title IX, to provide for a narrow triggering clause, to restrict the scope of the Act to students, and, to include under the jurisdiction of the Act the admission process of recipients. Senator Hatch seems to have had the Court in mind: "The amendment would dispose of the issues in the *Grove City College versus Harris* case, currently on litigation, in which the Department of Education has contended that Federal aid to a student is sufficient by itself to subject to Title IX all the activities of whatever school he or she decides to attend." 127 *Cong. Rec.* S636 (daily ed., January 24, 1981). Two other bills were also introduced. SR 478 was introduced on September 22, 1982, and HR 190 was introduced on May 10, 1983. It reported without amendment, seemingly with the intention of signaling to the Court the House's preferences for institution-wide fund termination.

64. It has been argued that the Court's decision in *Grove City* was in fact the correct legal interpretation of Title IX. Garvey (1986) argues that program-specific enforcement is the standard that better fits the rationale under which Congress decided to forbid discriminatory practices by those receiving Federal aid.

65. For example, §2363 (Feb. 28, 1984: to change "program or activity" to include institution); § 2568 (April 12, 1984: to restore Title IX to its broad coverage in enforcement); § 2910 (August 7, 1984); § 3079 (October 5, 1984). § 431 and HR 700 (February 7, 1985: to restore the prior executive branch interpretation and broad, institution wide application of Title IX); § 272 (January 24, 1985, to require than in the case of educational institutions, the phrase "program or activity" shall mean the entire institution).

change in the political configuration of Congress, our model suggests that there should be an attempt by Congress to overturn *Grove City*. In fact, in 1987, Senator Kennedy introduced S. 557. The bill was similar in language and scope to S. 431. It was introduced under the findings that the Supreme Court had "unduly narrowed or cast doubt upon the broad application" of Title IX and therefore legislative action was necessary to restore the institution-wide application of Title IX.<sup>66</sup> On January 28, 1988 the Senate voted favorably upon S. 557. The bill was passed by a vote of 75 to 14. The House approved the bill on March 2, 1988, by a vote of 315 to 98.<sup>67</sup>

From Figure 9 it is clear that under the new contract curve, *Grove City*,  $E_1$ , is no longer a long-run equilibrium. The new long-run equilibrium (S. 557) is slightly broader in its enforcement guidelines than the status quo before *Grove City*, and must be located in the area to the right of  $E_0$ .<sup>68</sup>

To summarize, *Grove City* provides a good example of strategic behavior by the courts. In the same way as in *State Farm*, facing a divided Congress, the Court chooses to intervene by obtaining support from one of the Houses of Congress (in *State Farm*, the House; in *Grove City*, the Senate). Once Congress becomes unified again, the Court does not try to maintain the status quo, but instead allows Congress to adjust the legislative outcome. Finally, while *Grove City* seems to be a pro-conservative and *State Farm* seems to be a pro-liberal decision, both are consistent with a Court whose political preferences are at neither extreme of the political spectrum.

## 5. FINAL COMMENTS

This article provides a microanalytic model of Supreme Court statutory decisions. Our model combines the rational-choice modeling strategy with the notion that institutions matter in the design of public policy. We use this model to understand, in a consistent way, two major recent Supreme Court decisions. These cases show how the Supreme Court responds to political change.

In both cases the Supreme Court follows the electoral results by adjusting to the changes in the composition of Congress and the Presidency. On the one hand, in *State Farm*, the supreme Court acted to reverse an admin-

66. § 557, enacting clause, 134 *Cong. Rec.* S266 (daily ed., January 28, 1988).

67. 134 *Cong. Rec.* H 565 (daily ed., March 2, 1988).

68. The exact position of  $E_2$  will depend on the significance attached to the Danforth amendment [§ 557, 134 *Cong. Rec.* S 266 (daily ed., Jan. 28, 1988)]. The Danforth amendment provides that institutions receiving aid are not required to provide or pay for abortions. The concern was that denial of abortion or related services would be perceived as discrimination against women. Reports in the press (e.g., *New York Times*, March 3, 1988) suggested that acceptance of the amendment led many Republicans to support the bill, giving Congress the supermajority needed to overturn a possible Presidential veto.

istrative policy that was implemented following changes in both Congress and the Presidency, which, in the absence of the Supreme Court, would have implied a drastic shift in regulatory policy. In *Grove City*, however, the Supreme Court moved to make a new policy following a change in the composition of the Senate. Such a new policy would have not, in the absence of the Supreme Court move, come out of Congress, since it would have been blocked by the House of Representatives. In both cases the Supreme Court decisions were supported by one of the houses of Congress and, thus, they could not be reversed by the then current Congress. While one is a pro-conservative and the other is a pro-liberal decision, both are consistent with a Court pursuing its own self-interest, as long as its preferences are not at either extreme of the political spectrum.

To summarize, we see in this article the dual role that the Supreme Court can play. On the one hand, it can be seen as supporting the status quo, and restraining both the President and Congress from undertaking drastic regulatory changes. On the other hand, the Supreme Court also plays an activist role, by introducing policies that change the status quo, even though Congress could not, by itself, legislate such policy changes. Thus, whether the Supreme Court is activist or restrained depends on the political circumstances. Following changes in Congress that create legislative stalemate, we would expect the Supreme Court to be activist. On the other hand, following a major change in the Presidency, we would expect the Supreme Court to follow a restrained path.

## APPENDIX

*Lemma 1.* Assume that (a) preferences of the House, the Senate, and the Supreme Court are represented by circular indifference curves in  $R^2$ ; (b) the initial equilibrium is in the interior of the contract curve; and (c) the electoral result implies a movement in the same direction of the ideal points of both the House and the Senate. Then, the long-run equilibrium moves in the same direction as the ideal points of the House and the Senate, independently of the location of the ideal point of the Supreme Court.

To prove the lemma, observe that with Euclidean preferences the contract curve is linear. Thus, there is a unique long-run equilibrium. Second, since both the House and the Senate move in the same direction, the contract curve also moves in the same direction. Thus, the set of all feasible equilibria also moves in the same direction as the House's and the Senate's ideal points. Thus, the long-run equilibrium also has to move in the same direction.

*Lemma 2.* Assume (a) and (b) from Lemma 1; and that (c), the electoral result, implies a movement only in the ideal point of one of the houses of Congress; (d) the movement is only in one dimension, call it  $x_1$ ; and (e) the initial equilibrium level of  $x_1$  is below the most preferred point of the Supreme Court. Then the new long-run equilibrium will follow the move in the electorate. If, however, (f) the initial equilibrium level of  $x_1$  exceeds the most preferred point of the Supreme Court, then the new long-run equilibrium will follow the move in the electorate only if the initial contract curve implies a relatively low rate of substitution (to be specified below) between  $x_1$  and  $x_2$ .

To prove the lemma, observe that from (a), the contract curve is linear. Thus, in a  $(x_1, x_2)$  plane, the contract curve can be represented by  $x_1 = a + bx_2$ , where  $a = (x_{2S}x_{1H} - x_{1S}x_{2H})/(x_{2S} - x_{2H})$ , and  $b = (x_{1S} - x_{1H})/(x_{2S} - x_{2H})$ , with  $x_S$  ( $x_H$ ) representing the ideal point of the Senate (House). If we assume, say, that the House (Senate) has a higher demand for  $x_2$  ( $x_1$ ) than for  $x_1$  ( $x_2$ ), then  $b < 0$ ,  $a > 0$ . Hence, the first-order condition for the Supreme Court can be represented by (where  $^{SC}U$  represents the utility function of the Supreme Court)

$$^{SC}U_1b + ^{SC}U_2 = 0, \quad \Delta = ^{SC}U_{11}b^2 + ^{SC}U_{22} < 0. \tag{A1}$$

Assume, now, a movement in the ideal point of the Senate, such that  $dx_{1S} > 0$ ,  $dx_{2S} = 0$ . Then, fully differentiating (A1), we obtain

$$\frac{dx_1}{dx_{1S}} = \frac{2[-(a' + b'x_{20}) + bb'(x_{10} - x_{1SC})]}{^{SC}U_{11}b^2 + ^{SC}U_{22}},$$

$$\frac{dx_2}{dx_{1S}} = \frac{2[b(a' + b'x_{20}) + b'(x_{10} - x_{1SC})]}{^{SC}U_{11}b^2 + ^{SC}U_{22}},$$

where  $a' = \partial a/\partial x_{1S} = -x_{2H}/(x_{2S} - x_{2H}) > 0$ ,  $b' = \partial b/\partial x_{1S} = 1/(x_{2S} - x_{2H}) < 0$ . Thus, after substitutions, we obtain that

$$\text{sgn} \frac{dx_1}{dx_{1S}} = \text{sgn}[x_{2H} - x_{20} + b(x_{10} - x_{1SC})]$$

or, from (b),

$$\frac{dx_1}{dx_{1S}} \geq 0 \Leftrightarrow 1 \geq -b(x_{10} - x_{1SC})/(x_{2H} - x_{20}).$$

Thus, if (e) holds, so that  $x_{10} - x_{1SC} < 0$ , then  $dx_1/dx_{1S} > 0$ . If, however, (f) holds, so that  $x_{10} - x_{1SC} > 0$ , then the sign of  $dx_1/dx_{1S}$  depends on the value of  $b$ . Then, for very steep contract curves (high values of  $-b$ ), increases in

$x_{1S}$  may reduce the equilibrium value of  $x_1$ . Observe that a steep contract curve implies that the Senate's ideal point changes in the dimension that most separates the House from the Senate. Finally, observe that assumption (e) implies that the ideal point of the Supreme Court is below the contract curve, while assumption (f) implies that its ideal point is above the contract curve.

We can then state Proposition 2.

*Proposition 2.* Assume that (a) preferences of the House, the Senate, and the Supreme Court are represented by circular indifference curves in  $R^2$ ; and (b) the initial equilibrium is in the interior of the contract curve. Then, moves in the electorate where either only one house moves or both houses move in the same direction will imply changes in the long-run equilibrium which will follow the electorate, unless the change is in only one house, and the dimension that changes is (a), one that most separates the House from the Senate, and (b) the initial status quo implying a larger equilibrium value for that dimension than that of the ideal point of the Supreme Court.

The proof of the proposition is a direct application of Lemmas 1 and 2.

## REFERENCES

- Adamany, D. 1973. "Legitimacy, Realignment Elections, and the Supreme Court," 3 *Wisconsin Law Review* 790-846.
- Binmore, K. 1987. "Nash Bargaining Theory, I: An Introduction," in K. Binmore, and P. Dasgupta, eds., *The Economics of Bargaining*. Oxford, UK: Basil Blackwell.
- Casper, J. 1976. "The Supreme Court and National Policy," 70 *American Political Science Review* 50-63.
- Dahl, R. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," 6 *Journal of Public Policy* 279-95.
- Easterbrook, F. 1982. "Ways of Criticizing the Court," 95 *Harvard Law Review* 802-32.
- Ferejohn, John, and Charles Shipan. 1988. "Congressional Influence on Administrative Agencies: A Case Study of Telecommunications Policy." Mimeo, Stanford University.
- Fiorina, M. 1974. *Representatives, Roll Calls and Constituencies*. Lexington, MA: Heath and Co.
- Funston, R. 1975. "The Supreme Court and Critical Elections," 69 *American Political Science Review* 795-811.
- Garland, M. 1985. "Deregulation and Judicial Review," 98 *Harvard Law Review* 505-91.
- Garvey, J. 1986. "The Program or Activity" Rule in Antidiscrimination Law: A Comment on S. 272, H.R. 700 and S. 431," 23 *Harvard Journal on Legislation* 445-82.

- Gely, R., and P. T. Spiller. 1989. "The Political Economy of Supreme Court Constitutional Decisions: The Case of the Court Packing Plan," University of Illinois; forthcoming in *International Review of Law and Economics*.
- Gilligan, Thomas W., and Keith Krehbiel. 1988. "Organization of Informative Committees by a Rational Legislature," Mimeo, Hoover Institutions Working Papers in Political Science 9-88-13.
- Halpern, S., and C. Lamb. 1982. *Supreme Court Activist and Restraint*. Lexington, MA: D. C. Heath.
- Handberg, R., and H. Hill. 1980. "Court Curbing, Court Reversals, and Judicial Review: The Supreme Court Versus Congress," 14 *Law and Society Review* 309-22.
- , and ———. 1984. "Judicial Activism and Restraint on the United States Supreme Court: A Political-Behavioral Analysis," 20 *California Western Law Review* 173-86.
- Henschen, B. 1983. "Statutory Interpretation of the Supreme Court: Congressional Response," 11 *American Political Quarterly* 441-58.
- Kalt, J., and M. Zupan. 1984. "Capture and Ideology in the Economic Theory of Politics," 74 *American Economic Review* 279-300.
- Kau, J. B., and P. Rubin. 1979. "Self Interest, Ideology and Logrolling in Congressional Voting," 22 *Journal of Law and Economics* 365-84.
- Marks, B. 1988. "A Model of Judicial Influence on Congressional Policymaking: 'Grove City College v. Bell'," Working Paper in Political Science P-88-7, Hoover Institution.
- McCubbins, M. D., and T. Schwartz. 1984. "Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms," 28 *American Journal of Political Science* 165-79.
- McCubbins, M., R. Noll, and B. R. Weingast. 1987. "Administrative Procedures as Instruments of Political Control," 3 *Journal of Law, Economics, and Organization* 243-77.
- , ———, and ———. 1989. "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies," 75 *Virginia Law Review* 431-82.
- Nagel, S. 1969. "Curbing the Court: The Politics of Congressional Reaction," in S. Nagel, ed., *The Legal Process from a Behavioral Perspective*. Homewood, IL: Doresy Press.
- Nowak, J., R. Rotunda, and J. Young. 1983. *Constitutional Law*, 2nd ed. St. Paul, MN: West Publishing.
- Peltzman, S. 1984. "Constituent Interest and Congressional Voting," 27 *Journal of Law and Economics* 181-210.
- Rohde, D., and H. Spaeth. 1976. *Supreme Court Decision Making*. San Francisco: W. H. Freeman.
- Shepsle, K. 1979. "Institutional Arrangements and Equilibrium in Multidimensional Voting Models," 23 *American Journal of Political Science* 27-59.
- , and B. R. Weingast. 1981. "Structure-Induced Equilibrium and Legislative Choice," 37 *Public Choice* 503-19.
- , and ———. 1982. "Institutionalizing Majority Rule: A Social Choice Theory with Policy Implications," 72 *AEA Papers and Proceedings* 367-71.
- , and ———. 1987. "The Institutional Foundations of Committee Power," 81 *American Political Sciences Review* 85-104.
- , and ———. 1989. "Penultimate Power: Conference Committees and the Legislative Process," Hoover Institution Discussion Paper no. P-89-7, Stanford University.

- Spiller, P. T. 1990a. "Governmental Institutions and Regulatory Policy: A Rational Choice Analysis of Telecommunications Deregulation," University of Illinois.
- . 1990b. "Politicians, Interests Groups, and Regulators: A Multiple-Principal Agency Theory of Regulation, (or Let Them be Bribe)," 33 *Journal of Law and Economics* 65–101.
- . 1990c. "Agency Discretion under Judicial Review," University of Illinois.
- , and R. Gely. 1990a. "Congressional Control or Judicial Independence: The Determinants of US Supreme Court Labor Relations Decisions, 1949/1987," Mimeo, University of Illinois.
- , and ———. 1990b. "Understanding the Court," University of Illinois.
- Thomas, L., M. Wildemann, and R. Brown. 1987. "The Courts Agency Deregulation: Limitations on the Presidential Control of Regulatory Policy," 39 *Administrative Law Review* 27–42.
- Wasby, S. 1988. *The Supreme Court in the Federal Judiciary System*, 3rd ed. Chicago, IL: Nelson-Hall Publishers.
- Weingast, B. R. 1981. "Regulation, Reregulation and Deregulation: The Political Foundations of Agency Clientele Relationships," 44 *Law and Contemporary Problems* 147–77.
- . 1984. "The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC), 44 *Public Choice* 147–91.
- , and W. J. Marshall. 1987. "The Industrial Organization of Congress, (or, Why Legislatures, Like Firms, are not Organized as Markets)," 96 *Journal of Political Economy* 132–63.
- , and M. J. Moran. 1983. "Bureaucratic Discretion or Congressional Control?: Regulatory Policymaking by the Federal Trade Commission," 91 *Journal of Political Economy* 765–800.