CONGRESS AND THE SUPREME COURT: PREEMPTIVE COURT-CURBING AND INSTITUTIONAL RIVALRY

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It has been clearly and empirically shown that the Supreme Court will retreat when faced with Congressional Court-curbing legislation that could undermine its authority and reduce its policy-setting capacity. Why and when Congress will propose such legislation has remained a mystery. This paper seeks to solve this puzzle and argues that Congressional Court-curbing is often a direct attack on a Supreme Court that Congress perceives as threatening to its policy-setting capacity. This paper also proposes and supports that members of Congress view the Supreme Court as an inherent rival and rely on the number of cases heard by the Supreme Court during a given session as a way of judging the relative threat of that Supreme Court to the policy-making power of Congress and the status quo of US government policy.

The Supreme Court and Congress are rivals. The Supreme Court has the self-imposed power of judicial review, with which it can respond to and strike down Congressional policy. The Supreme Court – through the majority opinion – may then shape policy to coincide with its preferences. Members of Congress, on the other hand, can both create policy and

respond to Court efforts to alter existing policy. This response can take the form of Court-curbing legislation: legislation specifically designed to somehow weaken the Court's influence and power over policy.[1]

Court-curbing legislation is defined as a "legislative proposal to restrict, remove, or otherwise limit judicial power."[2] A specific example of this very broad definition would be H.R. 5528, "The Pornography and Jurisdiction Act of 2006," which attempts to declare that no federal court, including the Supreme Court, has the authority to judge laws pertaining to pornography, thus stifling the Court's policy-setting power in an area that it has previously made many rulings. Comparable examples exist for almost every area of policy: abortion, freedom of speech, flag burning, signing statements, taxes, and numerous others have all been topics for Court-curbing. The passage of any one of these would almost completely destroy the Court's authority to establish its preferred policy in that area, thus demonstrating the potentially enormous impacts of Court-curbing legislation and the constraints such legislation places on the Court.

Both the Supreme Court and Congress have unique powers that are more than suited to counteracting the other's policy and replacing it with their own preferences, and both institutions have employed these powers in the past. This relationship makes the Supreme Court and Congress inherent rivals. The question remains, however, when will these institutions choose to employ their powers and act against the policy preferences of the other?

There has been a substantial amount of previous research that

explains why and when the Supreme Court will overturn Congressional policy.[3] This field of study is well established and provides great insight into this rivalry from the Court's perspective.

From a Congressional perspective, however, there exists no explanation in political science literature as to why and when members of Congress will oppose the Court and – more specifically – why and when Court-curbing legislation will be proposed. This paper argues that members of Congress perceive the Supreme Court as an inherent institutional rival that possesses a very real and significant threat to their preferred policy. As a result of this perception, members of Congress will seek to curb a Court that makes efforts – or is expected to make efforts – to further increase its institutional authority and/or its impact on policy.

Theory of Institutional Rivalry and Court-curbing

In order to understand the relationship between Congress and the Supreme Court, it is helpful to employ a rational actor theory in support of this paper's arguments. To do so, it is necessary to make several key assumptions about Congressional and judicial behavior in order to accurately gauge the interaction of these institutions. The following is a list of these key assumptions followed by the arguments in favor of the Theory of Institutional Rivalry and Court-curbing.

Assumptions

Assumption One: Congress and the Supreme Court are comprised of rational actors who value reelection – in the case of Congress – and the implementation of their preferred policy; these actors also attempt to predict future events and

interactions. The first part of this assumption is well established; much research and common sense has shown that members of Congress are rational actors who value reelection.[4] Secondly, the assumption that legislators and justices have policy preferences and that they value their preferences over opposing preferences is unremarkable.[5] Finally, many researchers across numerous disciplines have argued that rational actors will attempt to predict future events and interactions while playing a strategic game to achieve their own best interests.[6]

As it specifically relates to this paper's theory, the assumption of predictive behavior on the part of legislators is exemplified in their desire to limit a Court that may seek to limit Congressional policy-setting power. Due to the long-term threat of a strengthened Supreme Court, an unconstitutional verdict, and a corresponding opinion that would establish such a decision in Common Law, Congresspersons – it is assumed – will actively seek to gauge the level of threat being presented by the Court, through whatever means they can. The Court is also equally capable of predicting future events, which is precisely why they retreat in the face of proposed Court-curbing legislation and do not wait for such proposals to become laws.[7]

Assumption Two: The Supreme Court and Congress are institutional rivals. It is argued by this paper and numerous others that Congress and the Supreme Court both possess a very real threat to the other's policy-setting power.[8] Given the enormous sway that these institutions have over each other and policy outcomes, and considering that almost any rational actor would prefer not to have an

external check and review of their work and policies, it is not difficult to understand why the Court and Congress are rivals.

This rivalry is not just political or policy based, however: it is also institutional and intentional. Furthermore, this rivalry between Congress and the Court transcends party affiliation and similar policy preferences.[9] In short, the literature clearly establishes that the Court and Congress are rivals and strongly suggests that this rivalry is constant and not reliant on the "issues of the day" or ideological differences.[10]

Assumption Three: Congresspersons and Supreme Court Justices have a conscious and vested interest in preserving and increasing the authority and autonomy of their respective institution. In order to achieve their policy preferences in future, it is necessary for members of both the Court and Congress to preserve the power over policy possessed by their institutions.[11] This is the primary reason why the Court chooses to withdraw in the face of Congressional Court-curbing.[12] Less intuitively, this helps to explain why members of Congress who agree with the current policy preferences of the Court would still feel threatened by an increase in the Court's activity. The Court's ability to set a precedent on its own activity levels as well as legal precedents means that, if left unchecked, the Court can strengthen itself and thereby wield more power over the future establishment of its policy, thus reducing the effectiveness of future policy created by Congress that may diverge from the interests of the Court.

Assumption Four: The size of the docket sends threatening signals to Congress. The size of the Court's

docket is worrisome to Congress because the hearing of more cases signals an increase in the role of the Court. As it has been argued previously, Congress and the Court are rivals and both are comprised of rational actors; therefore, it is logical to assume that if there were no outside factors, Congresspersons would prefer a Supreme Court that had no authority over their policy or a Supreme Court that always agreed with them. Since neither of these options is possible, any movement of the Supreme Court towards having a larger potential impact on policy – as opposed to a Congressmen's preference of no impact – will signal an increase in institutional threat to Congress.

Theoretical Argument

Congress, being comprised of rational actors who routinely deal with – and compete against – the Supreme Court over ideal policy points, understands that the Court has the authority to undo their acts by finding them unconstitutional. Furthermore, members of Congress understand that as the Supreme Court establishes precedent, it will become more difficult for Congress to establish policy along the same lines of that which the Court has already struck down.[13] This immediate and long term power of the Court to prevent Congresspersons from establishing their ideal policy preferences is well known and understood by members of Congress, and accordingly, Congresspersons will be more likely to attempt to limit the Court when they suspect that the Court is threatening to oppose Congressional policy, thus preserving their own policy-setting authority.

It is for these reasons that the actual striking down of Congressional decisions at the hands of the Court is

not a necessary condition for an increase in the amount of Court-curbing activity in Congress. The mere threat of the Court undoing Congressional legislation is sufficient to increase the amount of Court-curbing at the hands of Congress, and this threat is more visible to members of Congress as the Court hears more cases, thus increasing the role of an institutional rival to Congress. It is expected, therefore, that as the number of cases heard increases – regardless of reasons for that increase – so too will the amount of Court-curbing undertaken in Congress.

Theoretical Hypothesis*:* As the size of the Supreme Court's docket increases during a given year, Court-curbing efforts in Congress will also increase.

Empirical Analysis

Much previous literature has used ordinary least squares regression analysis in order to analyze both the concepts and the identical variables used in this paper. OLS regression is, however, not an appropriate measure of these relationships, as the primary dependent and independent variables to be measured are incapable of being negative. Furthermore, data used in this project is count data that is time series and runs from 1953 to 2006. The correct analytical tool for exploring this paper's concepts, data, and variables is the negative binomial regression. In the interest of saving time and space, all models presented below are negative binomial regressions; however, all of these models were run as OLS regressions and comparable – albeit invalid – results were generated.

Variables

Dependent Variable

The Dependent Variable in this analysis is the total number of

proposed Court-curbing laws in the US Congress during a particular year. To make an important distinction, the majority of this proposed legislation never became law: it was merely proposed. Nevertheless, it has been shown by previous research that the Court will respond and invalidate fewer acts of Congress as the amount of proposed Court-curbing legislation increases.[14]

Court-curbing legislation is any legislation "which is defined as a legislative proposal to restrict, remove, or otherwise limit judicial power."[15] No distinction is made between legislation that originated in the Senate or the House of Representatives, and no distinction is made as to the number of Congresspersons that co-sponsored the legislation.

This variable was measured in two ways. For the years of 1956 to 1989, a synopsis of every bill referred to the Judiciary Committee of either house was read and included in the dataset if it met the definition of Court-curbing legislation: "legislative proposal to restrict, remove, or otherwise limit judicial power." For all remaining years in the data, the online THOMAS search engine was used to find legislation pertaining to the Judiciary, which was then reviewed using the definition stated previously.[16]

Primary Independent Variable

This measure is the total number of cases heard by the Supreme Court during a particular year. Congress obviously does not use the same schedule as the Supreme Court to determine its sessions; as a result, a calendar year is used as a common point of measure between the Court and Congress.

Control Variables

Laws invalidated by the Supreme

Court per year

This variable is the total number of laws invalidated by the Supreme Court during a particular year. This variable is included to control for the possibility that the proposal of Court-curbing legislation is in response to the number of laws invalidated by the Court and not the total number of cases heard.

Proportion of cases decided by one vote

The proportion of cases decided by one vote in the Supreme Court for a given year is measured simply by counting the number of cases decided in such a way.[17] This variable is included in the model to account for Congressional concern about a faction of Justices controlling and dominating the decision-making of the Court.

Congress controlled by opposite party

This measure is included in an attempt to account for the possibility that a Congress dominated by the opposite party as the Supreme Court will attempt to limit the Court for partisan or ideological reasons. In keeping with the theory proposed in this paper, it is expected that legislators will see a Court that hears more cases as a greater threat to their policy-setting power and will act to limit that Court, regardless of congruent or opposing party affiliation.

For this measure, if both houses of Congress are controlled by a different party from that which the majority of the Supreme Court justices identify for a given year, then a score of one is recorded, otherwise a zero is scored.[18]

Ideological divergence as measured by Bailey Distance Scores

This variable is a continuous measure of ideological divergence

of the median member of the Court from the median members of the House and Senate. If the median member of the Court is located between the median member of the House and the median member of the Senate, this scores a zero, thus depicting no divergence in ideology. If the score of the median member of the Court does not fall between those of Congress in Bailey space, then that Justice's distance from the closer of the two is measured. The lower this score, the more similar they are; the higher the score (up to a score of one), the more they differ ideologically in Bailey space.

Cases heard by an opposition Court

This variable was generated by multiplying the measure of whether Congress was controlled by the opposite party of the Court with the number of cases heard by the Court for the same year. Therefore, years that no party opposition existed would be measured as a zero, and years where there was opposition would score the same as the number of cases heard for that year. This measure is designed to gauge if an increase in proposed Court-curbing legislation is a result of an increase in docket size of an opposition Court and not a general increase in the number of cases heard.

Results

Model One in Table One demonstrates enormous statistical support for the theory and hypothesis put forth by this paper. The model's overall validity is strong and it possesses unique predictive value in understanding why and under what conditions Congress will seek to curb the Supreme Court. The strength of this model is further reinforced by the fact that these statistically significant results are achieved using

Model 1- The Negative Binomial Model

Table 1: NB Regression Analysis of the Effect of number of Cases Heard on Court-curbing Legislation						
	Model One Negative Binomial			Model Two Negative Binomial		
	B	SE	P	B	SE	P
Number of Cases Heard	0.01	0	***	0.01	0.01	**(.013)
Controls						
Congress Opposite Party	-0.21	0.25		-0.33	1.2	
Cases x Cong Opposite Party				0	0.01	
Number of Laws Struck	0.1	0.07		0.1	0.08	
Bailey Distances	-0.48	0.71		-0.47	0.72	
One vote Proportion	-5.19	2.45	**	-5.22	2.47	**
Constant	0.92	0.82		0.98	1.03	
N	50			50		
Log Likelihood	-154.62			-154.62		
Chi^2	21.96			21.97		

*** p<.01; ** p<.05; * p<.10

time-series data with a relatively low N of fifty.

This model robustly supports the theory that Congress will seek to curb a Court that hears more cases and is thus more threatening as an institutional rival, regardless of that Court's actual striking down of laws. This is demonstrated by the inclusion and lack of statistical significance of the number of laws struck by the Court, which is a highly valid measure of its underlying concept.

Model One also includes two separate controls for measuring the Court's ideological and political stance relative to Congress: the Bailey ideological scores and the measure of Court and Congress party congruency. These controls were shown to be statistically insignificant, thus furthering this paper's claim that policy-setting power and institutional rivalry – and not simply ideological differences – will drive members of Congress to curb the Court.

The lack of correlation between Court-curbing and ideology is further reinforced by Model Two. Model Two adds an interactive variable that controls for laws that are struck by a Supreme Court that has a majority composed of the opposite party than the majority of Congress. Despite the inclusion of this highly valid control for ideological-based Court-curbing, it appears that the number of cases heard by the Court has significantly more impact on the frequency of proposed Court-curbing legislation than the number of laws actually struck by a Court whose majority party is opposite to that of Congress's.

The only control that is statistically significant in either Model One or Two is the one vote proportion variable that measures the proportion of cases decided in the Supreme Court by a vote of five to four. As mentioned previously in this paper, the effects of this variable are puzzling, as it suggests a negative impact on the amount of Court-curbing legislation in Congress. This may be the result of Congress feeling less threatened by a sharply divided Court than a united Court. Such a claim is, however, purely speculative and not within the sphere of this paper. Overall, this variable does not diminish the findings of this model or the theory of this paper, but rather it represents an interesting topic that requires future research and explanation.

The Size of the Effect

Table One provides the predicted number of Court-curbing bills proposed in Congress (this is defined as Event Count or EC, as it is labeled in Table One) if the cases are set to the minimum recorded value in the data (77), the mean of the recorded

data (143), one standard deviation from the mean (182), and finally for the maximum recorded value (208). These predictions assume that all of the other variables are set at their mean value and are derived from Model One.

Model 2- Predicted Effect on the Amount of Court-curbing Legislation

Table 2: Predicted Effect on the Amount of Court-Curbing Legislation

Cases	EC	SE	P
77(min)	3.48	.94	***
144(mean)	7.92	0.92	***
183(1 SD)	12.87	2.12	***
208(max)	17.8	4.22	***

*** p<.01; ** p<.05; * p<.10
EC: Event Count, Proposals of Court-curbing legislation.
All variables other than "Cases" are set to their mean values.

The results in Table Two are directly interpretable and show that the statistically significant relationships demonstrated in Table One are also quite large and meaningful. A mean Supreme Court will hear approximately 143 cases per session. It is expected that at this activity level, Congress will see the proposal of approximately eight pieces of Court-curbing legislation. For an increase in Court activity that is one standard deviation above the average, it is expected that Congress will increase its proposed Court-curbing legislation by more than four such proposals. Under these conditions there is an approximate increase of 64% in the amount of proposed Court-curbing legislation. Furthermore, for the Court's maximum-recorded number of cases, it is expected that an additional five pieces of Court-curbing legislation will be proposed. That is a total approximate increase in Court-curbing legislation of more than 125% from the mean number of cases heard to the maximum. This provides extraordinary support for the theory that Congress reacts unfavorably to an increase in the caseload of the Supreme Court.

The inverse is true in this model

as well. As the Court hears fewer cases and in theory exerts less policy influence, it appears that Congress senses less of a threat to its policy-generating power, and thus fewer pieces of Court-curbing legislation are proposed. In fact, the expected drop from the average number of cases heard to the minimum recorded number of cases heard is nearly five, or approximately 49%.

Robustness Checks

Controlling for Public Opinion

To account for the possibility that public opinion might be driving Congressional Court-curbing it is valuable to measure the effect of this paper's model when public opinion is controlled for. To do this a new variable must be added to the model.

Public confidence in the Court as measured by GSS. This is a variable built from a General Social Survey that asks respondents about their confidence in the Court. Specifically, this measure records the percentage of people for a given year that report "little or no confidence" in the Court.[19] This variable is troublesome, however, because it is only recorded for thirty-two out of the fifty-four years in the data, as these were the only years that relevant survey questions were asked.

Model 3- Regression Analysis of the Effect of the number of Cases Heard on Court-curbing Legislation

Table 3: NB Regression Analysis of the Effect of number of Cases Heard on Court-curbing Legislation

	Negative Binomial		
	B	SE	P
Number of Cases Heard	0.01	0.00	*
Controls			
Congress Opposite Party	0.01	0.38	
One vote Proportion	-4.35	3.96	
Number of Laws Struck	0.03	0.08	
GSS Confidence In Court	0.04	0.06	
Constant	0.95	1.48	
N	31		
Log Likelihood	-92.77		
Chi^2	9.21		

*** p<.01; ** p<.05; * p<.10

Model Three in Table Three has been built using the General Social Survey data. The variables containing the Bailey scores and the interaction

variable measuring number of cases heard by an opposition Court were dropped, as their inclusion in such a small and already noisy model was statistically troublesome. The omission of these variables does not, however, damage the validity of this model, as the statically simplest and arguably most internally valid of the three measures of ideology remains: the measure of whether Congress is controlled by a different party than that which controls the Court.

Model Three demonstrates that the public's confidence in the Court is not statistically significant, but that the number of cases heard continues to have a positive and significant effect on the amount of Court-curbing legislation proposed. Model Three further reinforces this paper's argument that an increase in the number of cases heard by the Court increase the rate at which Court-curbing legislation is proposed and that this increase is not the result of public opinion or any other variable controlled for in this paper.

Conclusion

There is a distinct and unfortunate lack of empirical research into the strategic interactions of the US Supreme Court and Congress. This paper attempts to fill in part of this gap by examining what impact an increase in the size of the Court's docket has on the amount of Court-curbing bills proposed in Congress. Through use of a negative binomial regression analysis, this paper argues and finds substantial support for the theory that an increase in the number of cases heard by the Supreme Court will result in an increase in the amount of Court-curbing legislation proposed in Congress. This paper also argues that this effect will exist regardless of ideological

differences between the Court and Congress, the Court's actual striking of laws, or the opinion of the public. All of these points are supported by statistical analysis. In conclusion, this paper argues that Congresspersons perceive the Supreme Court as an institutional rival and that when Congresspersons witness this rival hearing more cases – and thus threatening to exert more influence over policy – Congresspersons are more likely to propose Court-curbing legislation in order to preemptively limit the influence of the Court.

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