

The Separation of Powers and Supreme Court Agenda Setting

Ryan J. Owens Harvard University

This study employs the first systematic, empirical analysis that relies on archival data to examine whether the separation of powers influences justices' agenda votes. It spatially models how justices set the Court's agenda under a sincere approach as well as an SOP approach and compares the competing expectations derived therefrom. The results suggest that legislative and executive preferences fail to influence justices' votes. Across every model tested, the data show justices uninfluenced by the separation of powers. These results provide a strong rejoinder to SOP models, since the Court's agenda stage is the most likely stage of the decision-making process to show signs of an SOP effect.

Do legislative and executive preferences cause justices to alter their behavior? Does the threat of a legislative override lead justices to avoid cases they otherwise would prefer to hear, or to leverage better policy outcomes than they would obtain in the absence of such a threat? The answer to these questions is no, at least according to most separation of powers (SOP) studies. For decades, institutional and empirical legal scholars toiled, searching to determine whether the Court follows the dominant political coalition, or whether it decides cases free from an electoral connection (Dahl 1957; Epstein, Knight, and Martin 2001; Segal 1997). While most studies suggest that justices are not influenced by the political branches, there is nevertheless reason to be skeptical.

Most SOP research analyzes whether Congress and the president influence the Court at the merits stage, addressing, among other questions, whether justices rule more liberally (conservatively) in the face of legislative resistance (Segal 1997) and whether they are less likely to strike down federal legislation during certain political regimes (Harvey and Friedman 2006; Sala and Spriggs 2004). To be sure, these studies are important. Still, though, by focusing on the Court's merits decisions, they analyze the stage of the process in which strategic SOP behavior is *least* likely to be found.

Because the Supreme Court can set its own agenda, justices may rationally anticipate political actors' prefer-

ences at the agenda stage and sift out those cases that will engender political rebuke. That is, "external political conditions may have a great deal of influence over whether a case ever appears on a court's docket, but may or may not continue to influence the actual manner in which the case finally is decided, given the filtering process that precedes voting on the merits" (Brace, Hall, and Langer 1998, 1269). Such strategic agenda setting may explain why scholars observe little to no evidence of a separation of powers effect at the merits stage. A more complete understanding of whether the separation of powers influences justices, then, must examine judicial behavior at the agenda-setting stage.

Accordingly, this study employs the first systematic, empirical analysis that relies on archival data culled from the private papers of former Supreme Court justices to examine whether legislative and executive preferences influence their agenda votes. It spatially models how justices set the Court's agenda under both a sincere (i.e., non-SOP) approach and an SOP approach and then compares the expectations derived from those models. The results strongly suggest that justices are *not* influenced by the separation of powers when they set the Court's agenda. Across every model tested, justices failed to exert behavior consistent with a separation of powers effect. Given that the agenda-setting stage is the precise moment where evidence of an SOP influence is most likely to be found,

Ryan J. Owens is Assistant Professor of Government, Harvard University, 1737 Cambridge Street, CGIS Knafel Building 408, Cambridge, MA 02138 (ryan_owens@gov.harvard.edu).

I thank Ryan Black, Tom Hammond, Pauline Kim, Bill Lowry, Michael Lynch, Tony Madonna, Andrew Martin, Rich Pacelle, Harvey Palmer, Reggie Sheehan, Steve Smith, and Jim Spriggs for their helpful comments. I also would like to thank Kiran Bhat for his research assistance, and the staff at the Library of Congress for their help. Finally, I thank the Center for Empirical Research in the Law at Washington University in Saint Louis and the Center for American Political Studies at Harvard University for their financial support.

American Journal of Political Science, Vol. 54, No. 2, April 2010, Pp. 412–427

©2010, Midwest Political Science Association

ISSN 0092-5853

these results provide a strong rejoinder to strategic SOP theories.

In what follows, I begin with an overview of the Supreme Court's agenda-setting process. I then discuss strategic SOP theory. Next, I model and compare the conditions under which congressional and executive preferences might induce strategic agenda votes. I then explain my data, fit a series of statistical models, discuss my results, and conclude with a discussion that explains the broader ramifications of these findings.

Setting the Agenda

In many ways, the procedure by which the Court sets its agenda primes justices to behave strategically (Caldeira, Wright, and Zorn 1999). The process begins when a litigant files a petition for a writ of certiorari (cert) or an appeal with the Court. The petition is randomly assigned to one of the law clerks in the "cert pool."¹ This clerk writes a preliminary memo (the "pool memo") that summarizes the proceedings in the lower courts and all legal claims made in the petition. It concludes with a recommendation for how the Court should treat the petition. The pool memo is then distributed to the chambers of the participating justices. Relying on this information, the Chief Justice circulates a list of the petitions he thinks deserve consideration by the Court at its next conference. This master list is called the "discuss list." Associate justices can add petitions to the discuss list that they think merit the Court's attention, but no one can remove a petition from the list that a colleague added. The Court summarily denies petitions that do not make the discuss list.

At conference, the justice who placed the case on the list leads off discussion of the petition. That justice then casts an agenda vote. In order of seniority, the remaining justices do the same. If four or more justices vote to grant review, the case proceeds to the merits stage.² Cert votes are entirely discretionary and, unless divulged by the personal papers of a former justice, are completely secret.

¹The cert pool originated in 1972 as a way to reduce the amount of cert petition work done in each individual chamber. Prior to its creation, each chamber independently reviewed every petition for cert (Ward and Weiden 2006, 118). Today, every justice but Stevens and Alito participates in the pool.

²Technically, the Court will grant review to a petition upon three grant votes plus one Join-3 vote (Black and Owens 2009b). A Join-3 vote is like a conditional grant vote: if at least three other justices vote to grant review to the case, the Join-3 vote is the equivalent of a grant vote. If fewer than three other justices vote to grant review, the Join-3 is treated as a denial.

Neither the public, Court staff, nor the justices' own law clerks are allowed in the conference room during these deliberations. This secrecy, plus the Court's lack of formal requirements for taking cases, sets the stage for strategic agenda setting.

Indeed, in recent years, we have learned much about the conditions under which the Supreme Court strategically sets its agenda. For example, justices are more likely to grant review to cases when the policy they expect the Court to make is better than the status quo (Black and Owens 2009a; Caldeira, Wright, and Zorn 1999). Similarly, Benesh, Brenner, and Spaeth (2002) and Boucher and Segal (1995) show how affirm-minded justices strategically anticipate the Court's likely merits ruling so as to avoid creating legal policy that is worse than the status quo. Other research finds that justices are more likely to grant review to salient cases so that they can maximize their scarce institutional resources on issues of broad importance (Caldeira and Wright 1988).

While all of these studies improve our understanding of the factors that lead justices to review cases, we know next to nothing about whether congressional and executive preferences influence justices' agenda-setting votes. Do legislative and executive preferences cause justices to alter their behavior? In the next section, I address this central question.

A Theory of Strategic SOP Agenda Setting

The theoretical starting point of strategic SOP models is that justices are seekers of policy who want to etch their preferences into law. "Most justices, in most cases, pursue policy; that is, they want to move the substantive content of law as close as possible to their preferred position" (Epstein and Knight 1998, 23). They are not unconstrained actors, however; instead, justices pursue their goals in an interdependent environment in which their decisions are a function not only of their personal policy preferences, but also the preferences of those with whom they must interact, namely, their colleagues (Maltzman, Spriggs, and Wahlbeck 2000) and—possibly—the other branches (Epstein and Knight 1998).

Congress and the president, the argument goes, possess the tools to influence the Court (Harvey and Friedman 2006, 2009). For example, Congress can initiate or support constitutional amendments to overturn judicial decisions. Among other powers, it can reduce the Court's budget, alter its composition, strip it of jurisdiction, hold judicial salaries constant, change pension

provisions, and impeach justices. By far, however, the most frequently (and likely to be) used tool in the congressional arsenal is the legislative override. As Eskridge points out, Congress is not afraid to override Supreme Court decisions it dislikes and has done so on a number of occasions (1991, 335–36).

Presidents, too, may influence the Court. “Even the members of the Court not appointed by the sitting president understand that the president’s status as a nationally elected official and his position at the reins of every executive branch agency make him a formidable foe under any circumstance” (Yalof 2003, 501). Presidents can refuse to enforce the Court’s decisions and order Cabinet Secretaries and other high-ranking officials to ignore them. They can unilaterally create their own executive policies and shift the policy status quo (Black et al. 2007). They can use their agenda-setting power to focus public scrutiny on judicial decisions. They can employ their Solicitors General to influence the Court (Bailey, Kamoie, and Maltzman 2005; Black and Owens 2009c). And, of course, they can sign or veto override legislation.

Studies that analyze whether these legislative and executive tools influence justices arrive at mixed conclusions, with most finding no evidence of an SOP effect (Sala and Spriggs 2004; Segal 1997; Spriggs and Hansford 2001). A handful of studies, however, arrive at a different conclusion. For example, Hansford and Damore (2000) find that some justices are likely to moderate their votes in the face of legislative hostility. The study analyzes Supreme Court statutory decisions from 1963 to 1995 to determine whether justices who are more conservative (liberal) than the closest legislative pivot moderate their votes. The data suggest that justices more *conservative* than the president and both judiciary committees moderate their votes to avoid legislative override.³ Still, there was no evidence to suggest that justices more *liberal* than the president and both judiciary committees moderated their votes. Since SOP models assert that both types of outlier justices should behave strategically, these results provide only mixed support for SOP claims. Further, because the study uses preference estimates for actors that do not scale across the branches, the results are limited.⁴

Spiller and Gely (1992) examine the Court’s labor relations cases, finding that the Court renders more pro-labor decisions as Congress becomes increasingly liberal. The authors argue that the Court rationally antic-

ipates Congress’s response and sets policy “such that it maximizes its utility and is not reversed by Congress” (Spiller and Gely 1992, 467). Nevertheless, the study does not include the president as a pivotal actor, though his assent is required for legislation (unless overridden by Congress). Moreover, to estimate legislative preferences, the study employs ADA scores, measures that have recently been shown to be poor estimates of such preferences (Lynch 2005; Snyder 1992) and do not scale across institutions.

Harvey and Friedman (2006) track the life of all congressional laws enacted between 1987 and 2000 and examine if and when the Supreme Court struck them down. The results suggest that the 1994 Republican Revolution, which provided the Court with a friendly Congress, played a key role in the Court’s increased proclivity to strike federal laws. While the study finds statistical significance in the SOP variable, the substantive impact is trivial: the predicted probability that the Court would strike a federal statute increased from 0.00036 in 1987 to 0.00137 in 2000 as the result of the Court’s new ideological location between a liberal president and conservative Congress. While this is an increase, it is not one of much impact. And, since the study does not include the president as a pivotal actor (other than in the filibuster-veto model), the findings remain unclear.

Only two existing studies attempt to examine SOP agenda setting on the Court. Epstein, Segal, and Victor (2002) examine the percent of statutory interpretation and constitutional interpretation cases on the Court’s docket over time. The study finds that the Court hears fewer statutory interpretation cases during terms in which it is ideologically at odds with Congress, as these cases would be easier for the legislature to override than constitutional cases. The analysis, however, uses ADA scores, preference estimates that do not scale, and focuses only on cases the Court decided to hear, leading to questions of selection bias. In a recent study, Harvey and Friedman (2009) find that the Court “ducks trouble” by avoiding cases likely to evoke a punitive response from Congress. That is, it tracks every statute passed between 1987 and 2000 to determine whether the Court reviewed it. Yet, the study does not control for any of the variables known to be associated with agenda setting. Most importantly, it ignores circuit splits and amicus curiae activity, two factors considered crucial to the Court’s agenda-setting decisions. Indeed, recent scholarship (Black and Owens 2009a) highlights the tremendous importance of these factors (see also Caldeira, Wright, and Zorn 1999; Perry 1991).⁵ The failure to include such vital docket-level data

³As I discuss more fully below, congressional scholars disagree over who controls legislative outcomes. Hansford and Damore (2000) examine only two of these models and find mixed support for one.

⁴The study employs the percent of liberal votes a justice cast as a proxy for her ideology but NOMINATE scores as surrogates for legislative and executive preferences (see also Bergara, Richman, and Spiller 2003).

⁵What is more, the assumption that every statute is at risk of review by the Court each term is limiting. The Court cannot review

limits the findings and, accordingly, leaves the central question unanswered: does the separation of powers influence justices' agenda decisions?

Modeling Justices' Agenda-Setting Votes

In this section, I model the conditions under which justices cast sincere (i.e., non-SOP induced) and SOP-induced agenda votes. The models theorize the anticipated policy location of the Court's majority opinions on the merits and, using backwards induction, derive empirically testable expectations for which justices will vote to grant review to cases. After deriving competing expectations for how justices should vote under each approach, I compare them. That is, I isolate the behavior of those justices whose expected SOP-induced votes are different from their sincere votes, allowing me to overcome concerns about observational equivalence.

The models make the following standard assumptions: all actors have continuous, single-peaked, symmetric preferences on a unidimensional policy scale and prefer policy that is closest to their ideal points (Sala and Spriggs 2004). There exists a status quo that can be measured on the same unidimensional scale. All actors know each others' preferences and the policy location of the status quo (Harvey and Friedman 2006). Since justices' preferences are categorized fully by the model, they will choose equilibrium voting strategies even when their votes are not pivotal (Sala and Spriggs 2004). The Court can set policy anywhere in the policy space when it renders a decision. And, finally, justices want to avoid legislative overrides. That is, the model "assumes that the Court will act to avoid Court-punishing legislation. . . [by setting] policy as close to. . . [its] ideal point as possible while forestalling punitive congressional action" (Harvey and Friedman 2006, 538).⁶

By modeling justices' decision to join the majority coalition in a case, I can use backwards induction to model which justices should vote to grant review (Hammond, Bonneau, and Sheehan 2005). Majority opinion coalitions

any statute it wishes—parties must appeal a lower court decision involving that statute to the Court.

⁶This assumption accords with those made in nearly all SOP models (see, e.g., Bergara, Richman, and Spiller 2003; Gely and Spiller 1990; Harvey and Friedman 2006; Sala and Spriggs 2004; Segal 1997; Spiller and Gely 1992). That I find no evidence of an SOP influence, however, might suggest that this assumption is unwarranted (see, e.g., Spiller and Tiller 1996). I discuss this possibility in the conclusion.

can be explained by locating each justice's ideal point in relation to the status quo and the expected policy location of the merits decision. As Hammond, Bonneau, and Sheehan (2005) argue, justices who are ideologically closer to the expected policy location of the merits decision than to the status quo should join the majority opinion. Justices who prefer the status quo over the expected merits decision should not join the majority coalition.⁷

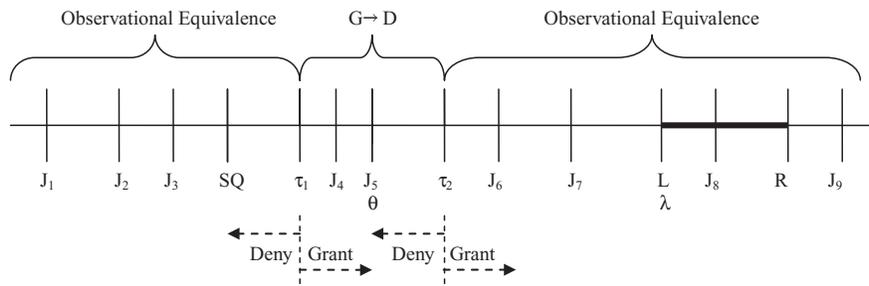
Figure 1 provides an example. Let τ_1 be the cutpoint between the status quo (SQ) and θ , the expected policy decision on the merits ($\tau_1 = \frac{SQ+\theta}{2}$). All justices to the right of τ_1 are expected to join the majority opinion because they prefer the expected policy outcome of the case to the status quo. Those on or to the left of τ_1 will not join it because they prefer the status quo to the new policy. Since justices largely cast their agenda votes in anticipation of the merits decision (Black and Owens 2009a; Caldeira, Wright, and Zorn 1999), one can model which justices should grant or deny review in a case. Justices who expect to join the majority coalition should vote to grant review, while those who anticipate being in dissent should vote to deny review. That is, under the sincere (i.e., non-SOP) approach, justices who are closer to θ than to SQ should vote to grant review while justices who are closer to SQ than to θ should vote to deny review.

If, on the other hand, justices play the SOP game, their voting behavior during both the merits and agenda stages should differ from the example above. That is, justices' agenda decisions now are part of a more complex game. In stage one, each justice votes either to grant or deny review to a petition. If the Court denies review, there is no change to the status quo. In stage two, the Court renders a decision on the merits, which then becomes the new status quo for all actors. In stage three, Congress can attempt to override the Court's decision. In stage four, the president either signs the override bill or vetoes it. If the president vetoes the bill, Congress then decides whether to override that veto. If justices play the SOP game, they

⁷Clearly, this is a simplifying assumption, but it is one with strong empirical support. In a recent article, Black and Owens (2009a) find evidence for precisely the claim made here—that justices largely vote to grant review to cases by determining whether they are closer to the status quo in a case or to the expected outcome on the merits. (They also examine when that assumption breaks down.) In fact, the authors used the same coding strategy as I do here to make that determination.

It is true, of course, that significant activity occurs during the opinion-writing process (Maltzman, Spriggs, and Wahlbeck 2000). Indeed, justices even disagree at times as to the issues involved in a case (McGuire and Palmer 1995; but see Epstein, Segal, and Johnson 1996). Nevertheless, the bench median model—the model on which I base this analysis—argues that even in the face of this activity, the median's position, on average, wins out (Bonneau et al. 2007).

FIGURE 1 Sophisticated Deny Votes



J_i = Ideal point of Justice i . J_5 = Median Justice. θ = Expected policy location of the Court's sincere merits decision. L = Leftmost legislative pivot. R = Rightmost legislative pivot. λ = Expected policy location of the Court's sophisticated merits decision. SQ = Status Quo. τ_1 = Midpoint between SQ and θ . τ_2 = Midpoint between SQ and λ . $G \rightarrow D$ denotes region in which justices cast grant votes in the absence of SOP influence but deny votes in its presence.

should cast sophisticated agenda votes by looking ahead to those future stages.

Figure 1 again illustrates \overline{LR} , which is the segment between the leftmost and rightmost legislative pivots, represents the legislative equilibrium: if a status quo exists within that set, there are no alternative points that make all legislative actors at least as well off (Hettinger and Zorn 2005, 7). Such a status quo is safe from Congress and the president. If a status quo falls outside the legislative equilibrium, however, it will be replaced by a point inside it. Thus, if the Court sets policy at θ during the merits stage, Congress would pass override legislation somewhere on \overline{LR} (Spiller and Gely 1992). To avoid this legislative response, the Court would render a merits decision at the leftmost pivot's ideal point (λ). This is the point in the legislative equilibrium that is closest to θ .

Accordingly, whereas in the absence of SOP influence, justices cast agenda votes by comparing SQ to θ , in the presence of such influence they cast sophisticated agenda votes by comparing SQ to λ (where λ is the expected policy induced by legislative preferences). If they prefer λ to SQ , they will vote to grant review. Conversely, if they prefer SQ to λ , they will vote to deny review.

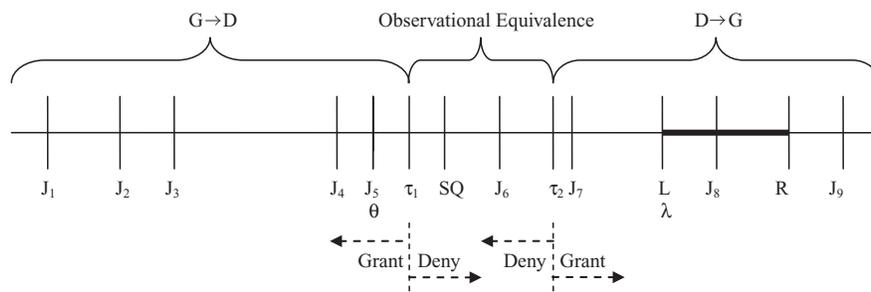
Comparing the Models

Justices' expected votes derived from the sincere and SOP models diverge in ways that can be isolated and leveraged for explanatory power. As Figure 1 shows, under a sincere approach, all justices to the right of τ_1 (where τ_1 = the midpoint between SQ and θ) are expected to vote to grant review while all of them on or to the left of τ_1 are expected to vote to deny review. Under a strategic SOP approach, justices to the right of τ_2 (where

τ_2 = the midpoint between SQ and λ) should vote to grant review while all of them on or to the left of τ_2 should vote to deny review. This dynamic produces a region between τ_1 and τ_2 in which the expectations of the sincere and SOP theories diverge. (Outside the region, the two theories yield observationally equivalent expectations—both the sincere and strategic models predict the same vote.) By analyzing the agenda votes of justices *inside* this region, I can empirically test whether justices play the SOP game.

Of course, strategic behavior means simply that an actor achieves the best possible outcome given the context within which she acts. This could mean that a justice strategically refrains from voting to grant review when she sincerely wishes to hear the case. Yet she might also use the threat of a legislative override to induce judicial outcomes that would be unlikely absent legislative influence. That is, the threat of a legislative override could spur a justice who otherwise would prefer to deny a case to instead force it on the Court's docket so that her colleagues would be forced to render a more favorable decision—one in line with legislative preferences. Figure 2 illustrates: if justices vote sincerely (i.e., they ignore the preferences of Congress and the president), all of them to the right of τ_1 should vote to deny review, since they prefer SQ to θ . If, however, they play the SOP game, justices to the right of τ_2 will vote to grant review. That is, if these justices vote to grant review and force the case on the Court's docket, the remaining justices would have to moderate their final policy to the closest legislative pivot's ideal point to avoid a showdown with Congress and the president. In short, by forcing the case onto the Court's docket, these justices may be able to induce a merits decision at λ rather than θ .

FIGURE 2 Sophisticated Grant Votes



J_i = Ideal point of Justice; J_5 = Median Justice. θ = Expected policy location of the Court's sincere merits decision. L = Leftmost legislative pivot. R = Rightmost legislative pivot. λ = Expected policy location of the Court's sophisticated merits decision. SQ = Status Quo. τ_1 = Midpoint between SQ and θ . τ_2 = Midpoint between SQ and λ . $G \rightarrow D$ denotes the region in which justices cast grant votes in the absence of SOP influence but deny votes in its presence. $D \rightarrow G$ denotes the region in which justices cast deny votes in the absence of SOP influence but grant votes in its presence.

I examine four regimes (plus their mirrors) that produce regions of divergent expectations for sincere and strategic behavior like the examples above. In Regime 1, which is represented by Figure 1, the status quo is more liberal than both θ and the leftmost legislative pivot ($SQ < \theta < L < R$). In Regime 2, which is represented in Figure 2, θ is more liberal than the status quo and the leftmost pivot ($\theta < SQ < L < R$). In Regime 3, θ is more liberal than both legislative pivots and the status quo ($SQ < L < R < \theta$). Finally, in Regime 4, θ is more liberal than the leftmost pivot, while the status quo sits between the two legislative pivots ($\theta < L < SQ < R$). Any time the median justice is ideologically between the legislative pivots, the Court is uninfluenced by the separation of powers (Harvey and Friedman 2006), as there is no policy change that would make both pivots better off than the Court's sincere choice.

The divergent expectations for sincere and strategic behavior produced by each regime, then, provide the following expectations: In Regime 1, the justices between τ_1 and τ_2 will vote to grant review if they are sincere but will vote to deny review if they are sophisticated SOP actors. Similarly, in Regime 2, justices to the left of τ_1 will vote to grant review and those to the right of τ_2 will vote to deny review if they do not play the SOP game. If they do play the SOP game, justices to the left of τ_1 will vote to deny review while those to the right of τ_2 will vote to grant review. And, finally, in Regimes 3 and 4, sincere agenda setters between τ_1 and τ_2 will vote to deny review while sophisticated SOP agenda setters within that space will vote to grant review. Stated otherwise:

Sophisticated Deny Hypothesis: If they play the separation of powers game, some justices who sincerely would prefer to grant review to a case will nevertheless cast a sophisticated vote to deny review.

Sophisticated Grant Hypothesis: If they play the separation of powers game, some justices who sincerely would prefer to deny review to a case will nevertheless cast a sophisticated vote to grant review.

Theories of Congress: Defining the Pivotal Legislative Actors

Determining which members of Congress constitute the pivotal legislative actors is a complicated task. Congressional scholars advocate multiple plausible theories of congressional decision making. Given the mixed findings in the congressional literature on each of these theories, I remain agnostic as to which is correct and therefore apply each of them. I provide a brief discussion of these models below, followed by an explanatory application of them to the Court's 1980 term.

Chamber Median Model

The chamber median model argues that legislative outcomes reflect the preferences of the median legislator in each chamber (Krehbiel 1995; Riker 1962). Members of Congress are elected with concrete preferences that drive

their voting behavior, the theory asserts, and as a result, the median member of each chamber controls legislative outcomes. That is, parties are simply the conglomeration of like-minded members who vote their preferences. Thus, the appropriate pivotal legislative actors to which justices must look if playing the SOP game are the chamber medians plus the president.

Figure 3, which represents the spatial layout of key pivots during the Court's 1980 term, illustrates.⁸ The Court (i.e., the median justice) was more liberal than the House and Senate medians and the president. The median member of the House—the leftmost pivot in this model—had a common space score of -0.027 . The median senator had a common space score of 0.014 . And, the president—the rightmost pivot—had a common space score of 0.567 . The Court, with a score of -0.088 , fell outside the legislative equilibrium and thus was exposed. If the Court set policy at θ , Congress and the president would override the policy with a bill located somewhere on \overline{LR} . To avoid this result, the Court would moderate its decision to the House median's ideal point, the closest pivot to it in the legislative equilibrium.

Party Gatekeeping Model

The party gatekeeping model argues that majority party leaders control voting procedures to channel outcomes to their liking and ensure that final votes reflect the desires of party members (Cox and McCubbins 2005). To facilitate legislative outcomes that aid their electoral chances, legislators create party leadership, whose function is to solve coordination problems among party members and pass laws that reflect its "brand name" (i.e., the preferences of the majority party median). Leadership will allow legislation to reach a floor vote only if the proposed legislation makes the majority party median better off than the status quo and, at the same time, will gain the approval of the floor median (Smith 2007). If the majority party median opens the gates and allows a bill to receive an up or down vote, the chamber median will pass legislation at its ideal point. By exercising negative agenda control, though, the majority can ensure that enacted legislation furthers its broad policy aims. Accordingly, the pivotal actors to which justices must look under the party gatekeeping model are the majority party medians in each chamber, the chamber medians, and the president.⁹

⁸Data on ideal point estimates in Figure 3 come from Poole and Rosenthal (1997) and Epstein, Segal, and Spaeth (2007).

⁹Scholars disagree over whether the majority party in the Senate possesses the same negative agenda control as the House majority

Again, Figure 3 illustrates. The Court rested easily between the leftmost pivot (the House majority party median) and the rightmost pivot (the president). During this term, then, the Court theoretically was not influenced by the separation of powers under the party gatekeeping model. If the House party median allowed an override bill to reach the floor, the result—a bill located at H —would be worse for the majority party than the Court's decision.

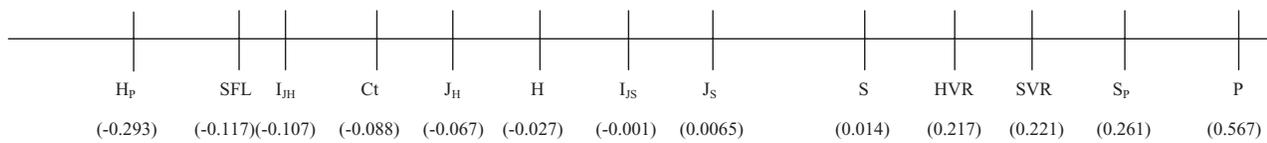
Committee Gatekeeping Model

The committee gatekeeping model argues that legislative outcomes are largely a function of committee preferences. When a member proposes a bill, the chamber's presiding officer refers that bill to the committee with jurisdiction over the subject matter. For the bill to proceed, the committee generally must report it to the floor. Committees thus possess "the ability to successfully defend the status quo in the face of a parent-chamber majority in favor of change. . ." (Smith 1989, 171). This gatekeeping power makes committees very powerful. Indeed, "very few measures are considered on the House and Senate floors without committee approval" (Smith 1989, 175). Once the committee reports the bill to the full chamber, an open rule allows the chamber to amend it; the result is a bill with the policy location of the parent chamber median. If the Court plays the SOP game, the committee gatekeeping model argues that justices will look to the preferences of the Judiciary Committee medians, the chamber medians, each Judiciary Committee median's indifference point vis-à-vis its parent chamber median, and the president.¹⁰

Figure 3 explains how, under the committee gatekeeping theory, the Court was uninfluenced by the separation of powers during the 1980 term. The leftmost pivot in this model is the House Judiciary Committee median's indifference point vis-à-vis the House chamber median. The right pivot, again, is the president. Because the House Judiciary median is ideologically closer to the Court's policy than to the House median, she would bottle up any legislation that seeks to override the Court's decision. (If, on the other hand, the Court set policy somewhere to the left of the House Judiciary Committee median's indifference point, the committee median would

party (Cox and McCubbins 2005; Smith 2007). This debate is irrelevant to my study, as the Senate majority party median was never the leftmost or rightmost pivot during the terms in which the Court theoretically was constrained under the party gatekeeping model.

¹⁰I also fit a model where the key pivots were the Judiciary Chairs rather than the committee medians. The results are substantively the same as those I report here using the committee median.

FIGURE 3 Common Space Location of Key Pivots, 1980 Supreme Court Term

Estimates from Poole and Rosenthal (1997) and Epstein et al. (2007). H_p = House majority party median. SFL = Left filibuster pivot in Senate (40th senator). I_{JH} = Indifference point of House Judiciary Committee median vis-à-vis House median. Ct = Supreme Court median. J_h = House Judiciary Median. H = House median. I_{JS} = Indifference point of Senate Judiciary Committee median vis-à-vis Senate median. J_s = Senate Judiciary Committee median. S = Senate median. HVR = Right House veto pivot (290th representative). SVR = Right Senate veto pivot (67th senator). S_p = Senate majority party median. P = President. Smaller values represent liberal preferences while greater values amount to increased conservatism. Note: Figure not drawn to scale.

open the gates and report such override legislation to the chamber.)

Veto-Filibuster Model

Finally, the veto-filibuster model argues that the veto and filibuster pivots may control legislative outcomes. The presidential veto and senate filibuster are potential obstacles to the legislative process that any successful legislation may need to overcome (Krehbiel 1998). Legislative overrides of presidential vetoes require the consent of two-thirds of both houses. Additionally, individual senators may filibuster legislation until stopped via cloture, which requires the consent of 60 senators.¹¹ Because these pivots are important actors to assuage, policy change sometimes requires large, bipartisan coalitions (Krehbiel 1998). The relevant pivots under this model depend on political circumstances. For Democrat presidents, the left pivot is the most liberal of the 146th Representative, the 34th Senator, the House and Senate medians, while the right pivot is the 60th Senator. For Republican presidents, the left pivot is the 40th Senator while the right pivot is the most conservative among the chamber medians, the 290th representative, and the 67th senator. In Figure 3, because the president was Republican, the key pivots were the 40th Senator (the filibuster pivot) and the 67th Senator (the veto pivot). The Court fell within those two extremes and, therefore, was not influenced by the separation of powers under this model. Table 1 provides a summary of the terms, by legislative model, in which the Court was theoretically influenced by the separation of powers.

¹¹In 1975, the Senate lowered the number of votes needed to invoke cloture from $\frac{2}{3}$ to $\frac{3}{5}$. Prior to that change, the filibuster pivots were the 34th Senator and the 67th Senator.

Data and Methods

The analysis of strategic SOP behavior is based upon 542 paid petitions coming out of a federal court of appeals that made the Supreme Court's discuss list¹² during the 1953–93 terms in which the Court was asked to interpret or exercise judicial review over a federal statute.¹³ I analyze cases dealing with federal statutes because Congress is most likely to care about them. That is, Congress has

¹²I examine only petitions from federal courts of appeals because currently there are no measures that map state supreme court justices on the same ideological scale as U.S. Supreme Court justices. I determined which cases made the Court's discuss list by traveling to the Library of Congress and searching through the papers of former Justices Blackmun, Brennan, Burton, Douglas, and Warren. (These data will soon be available on the author's webpage.) One potential concern is that by sampling from the discuss list, my data suffer from selection bias—that strategic justices may refuse to put a case on the discuss list if they expect Congress to override the Court's decision. This concern is unwarranted. First, numerous justices have stated that nearly all petitions off the list are frivolous (Brennan 1973; Ginsburg 1994, 479). There is little reason to expect justices to act strategically in such cases. Second, petitions that fail to make the discuss list are summarily (i.e., unanimously) denied, which would lead to little overall variation in my dependent variable—the justice vote. Third, it takes only one justice to place a case on the discuss list. While one justice might strategically refrain from putting a case on the discuss list, others are likely to be able to vote sincerely and, thus, put the case on. Fourth, among the justices' papers, only the Blackmun papers consistently describe which justice put the case on the discuss list, and even that list is of questionable value: if two or more justices put the same case on the discuss list, the Court's records attribute the case to the most senior justice alone (Rehnquist 1987, 289), a result that could lead to inappropriate inferences.

¹³While justices may not always agree on which issues underly an appeal—which would undercut my modeling assumption of a unidimensional policy space—my coding strategy largely obviates this concern. I narrowed my sample to cases where the parties disputed the interpretation or constitutionality of one statute or subsection thereof. To do so, I read the "Questions Presented" in every one of the certiorari petitions in my sample to ensure that the case involved only one primary statutory issue. Petitions seeking review over multiple statutory interpretation issues or constitutional challenges were excluded from the analysis.

TABLE 1 Terms During Which the Court Theoretically Was Influenced and Uninfluenced by the Separation of Powers

Uninfluenced Terms	Chamber Median	Party Gatekeeping	Committee Gatekeeping	Filibuster Veto
1955	1953	1953	1953	1963
1957	1954	1960	1954	1967
1958	1956	1976	1956	1968
1959	1960	1977	1968	1972
1961	1968	1978	1976	1974
1962	1976	1979	1977	1975
1964	1977	1992	1978	1976
1965	1978	1993	1979	1977
1966	1979		1992	1992
1969	1980		1993	1993
1970	1981			
1971	1992			
1973	1993			
1982				
1983				
1984				
1985				
1986				
1987				
1988				
1989				
1990				
1991				

indicated its ability to overcome its collective action problems to bear the transaction costs associated with the legislative process (Sala and Spriggs 2004). These are cases, then, where Congress should be most likely to respond with override legislation.

My tests of strategic behavior require four sources of data—an estimate of each pivotal actor's preferences, a measure of the status quo, a measure of the expected policy location of the Court's merits decision, and a source to code how each justice voted at the agenda stage.

Coding the Pivotal Actors' Preferences. To code the pivotal actors' preferences, I relied on Poole and Rosenthal's Common Space data and the Judicial Common Space (Epstein, Segal, and Spaeth 2007; Poole and Rosenthal 1997). These data provide measures of actors' policy preferences that are directly comparable across institutions (i.e., between Congress and the Court) and over time.¹⁴

Measuring the Status Quo. I determined the status quo by analyzing the Judicial Common Space scores of the judges who sat on the circuit court that heard the

case below. Most three-judge circuit court panel decisions are unanimous, so the status quo is generally the JCS score of the median judge on the circuit panel. In cases where a lower court judge filed a dissent or special concurrence and, thus, only two circuit judges constituted the winning coalition, I coded the status quo as the midpoint between the two circuit judges in the majority. If the lower court reviewed an en banc decision by the circuit below, I coded the status quo as the median judge in the en banc majority.¹⁵

Measuring the Expected Policy Location of the Merits Decision. I coded the expected policy location of the Court's merits decision as the Court's median member during the term in question, as identified by Epstein, Segal, and Spaeth (2007). That is, I rely on the "bench median model" created by Hammond, Bonneau, and Sheehan (2005). This model argues that the final opinion will locate at the median justice's ideal point. The equilibrium result of the bench median model is that no matter

¹⁵When district court judges sat by designation on the circuit panel, or when the appeal was from a three-judge district court panel, I followed the practice of Giles, Hettinger, and Peppers (2001) to code these judges consistent with the norm of senatorial courtesy.

¹⁴Bailey (2007) is an alternative.

TABLE 2 Probit Regression Model of Justices' Votes to Grant Review

Variable	Chamber Model	Party Model	Committee Model	Filibuster-Veto Model
	Coefficient (Robust SE)	Coefficient (Robust SE)	Coefficient (Robust SE)	Coefficient (Robust SE)
Sophisticated Deny	-0.096 (0.097)	-0.151 (0.092)	0.078 (0.106)	-0.314 (0.206)
Sincere Grant
Sophisticated Grant	0.002 (0.113)	-0.051 (0.133)	0.126 (0.111)	-0.068 (0.243)
Sincere Deny	-0.208* (0.092)	-0.280* (0.105)	-0.162 (0.111)	-0.226 (0.134)
Political Salience	0.152* (0.038)	0.206* (0.042)	0.186* (0.040)	0.323* (0.055)
Intermediate Reversal	0.062 (0.101)	0.108 (0.108)	0.150 (0.106)	0.331* (0.068)
Intermediate Dissent	0.295* (0.077)	0.156 (0.081)	0.235* (0.063)	0.060 (0.093)
Intermediate Conflict	0.657* (0.073)	0.637* (0.104)	0.720* (0.092)	0.751* (0.109)
U.S. Supports Petition	0.480* (0.128)	0.197 (0.131)	0.406* (0.096)	0.717* (0.089)
U.S. Opposes Petition	-0.269* (0.082)	-0.426* (0.107)	-0.235 (0.129)	-0.005 (0.098)
Intermediate Strike	1.866* (0.229)	1.960* (0.376)	1.822* (0.376)	2.711* (0.484)
Landmark Legislation	-0.143 (0.087)	-0.169 (0.092)	-0.324* (0.101)	-0.137 (0.125)
Constant	-0.797* (0.099)	-0.774* (0.101)	-0.842* (0.112)	-1.013* (0.103)
Observations	2054	1339	1237	898
Log Likelihood	-1127.266	-689.350	-669.740	-476.633
Pseudo R ²	0.129	0.129	0.135	0.187

*denotes $p < 0.05$ (two-tailed test). Robust standard errors clustered on justice are reported in parentheses. Wald statistic shows non-significant results for the sophisticated grant justices in the chamber median model ($\text{Pr} > \chi^2 = 0.11$), the party gatekeeping model ($\text{Pr} > \chi^2 = 0.14$), and filibuster-veto ($\text{Pr} > \chi^2 = 0.43$) models. The Wald statistic shows a statistically significant difference between the sophisticated grant and sincere deny justices in the committee gatekeeping model ($\text{Pr} > \chi^2 = 0.02$) (but see discussion in text). Different number of observations for each model because the Court was outside the legislative equilibrium in different terms, depending on the legislative model used.

who drafts the majority opinion, the Court's policy reflects the preferences of the median justice.¹⁶

¹⁶The assumption that the median drives outcomes has theoretical appeal (Martin, Quinn, and Epstein 2005) and empirical support (Bonneau et al. 2007). It should be noted that Bonneau et al. (2007) also propose an "agenda control" model which suggests that the policy content of the Court's opinions is determined by the preferences of the opinion author, conditioned by the status quo location and the author's need to acquire a majority to set precedent. That model is unhelpful at the agenda-setting stage, however, because justices have no a priori knowledge of who will

Justices' Agenda Votes. As stated above, justices' agenda votes are not released to the public. The only way

write the majority opinion (Hammond, Bonneau, and Sheehan 2005, 224). Even under the agenda control model, the median justice's preferences play a critical role by constraining the location of the opinion to the median justice's preferred-to set of the status quo, making the median absolutely essential. In short, while the median's policy position may not—in practice—always win out (Bonneau et al. 2007; Carrubba et al. 2007), justices have good reason to expect it to win out on average. It is the best guess a justice can make at the agenda stage and, therefore, is a reasonable compromise to allow the theoretical analysis to proceed.

TABLE 3 Summary of Sincere and Sophisticated Behavior

Variable	Preferred Vote	SOP-Consistent Vote
Sophisticated Deny	Grant	Deny
Sincere Grant	Grant	Grant
Sophisticated Grant	Deny	Grant
Sincere Deny	Deny	Deny

If justices are strategic, some of them who would cast sincere grant votes will nevertheless cast sophisticated deny votes. Similarly, those who would prefer to cast sincere deny votes might nonetheless vote to grant.

scholars can determine how a justice voted at the agenda stage is to obtain the Court's private docket sheets. I collected these data, along with the Court's conference lists, discuss lists, and pool memos, by digitally photographing over 17,000 images from the papers of Justices Blackmun, Brennan, Burton, Douglas, and Warren at the Library of Congress. I supplemented these data with the online archival data disseminated by Epstein, Segal, and Spaeth (2007). These data are highly accurate recordings of justices' agenda votes (Black and Owens 2010).¹⁷

My dependent variable, *Justice Vote*, measures whether a justice voted to grant (1) or deny (0) review to a petition (or appeal) during the Court's final agenda vote. In total, justices cast 4,878 agenda votes, of which 4,065 were usable votes.¹⁸ I rely on four main independent variables of interest that are summarized in Table 3 below. *Sophisticated Deny* receives a value of 1 if

¹⁷Black and Owens (2010) systematically analyzed justices' agenda records by comparing the docket sheets of multiple justices over the same cases. They found that justices kept records that largely matched each other, suggesting that the docket sheets are highly reliable measures for agenda votes.

¹⁸I code the following as votes to grant review: grant ($n = 1248$); note probable jurisdiction ($n = 83$); and postpone a discussion of jurisdiction to hear the merits ($n = 7$). I treat the following as votes to deny review: Deny ($n = 2696$) and dismiss for lack of jurisdiction ($n = 31$). The remaining 813 missing values were votes to call for the views of the Solicitor General ($n = 25$); grant, vacate, and remand the petition ($n = 402$); affirm ($n = 148$); hold the petition for the disposition of another case ($n = 60$); pass ($n = 9$); relist the case ($n = 1$), and reverse the lower court summarily ($n = 55$). Since these actions are not directly mappable onto a dichotomous framework and I lack any theory for their application, I counted them as missing data. Additionally, I treat Join-3 ($n = 113$) votes as missing values. Justices appear to have begun casting Join-3 votes around the time Justice Blackmun joined the Court. Since the vote did not exist for roughly half of my sample period, I excluded it for the sake of consistency. More importantly, in a recent paper, Black and Owens (2009b) find that Join-3 votes cannot simply be treated as grant or deny votes.

the justice sincerely would like to grant review (because she is closer to the Court median than to the status quo), but because of SOP influence is expected to vote to deny; 0 otherwise. *Sophisticated Grant* receives a value of 1 if the justice sincerely should deny review on policy grounds (because she is closer to the status quo than to the Court median), but because of SOP influence, should vote to grant; 0 otherwise.¹⁹ These two variables are then compared, respectively, against justices expected to cast *Sincere Grant* votes and *Sincere Deny* votes. *Sincere Grant* equals 1 if both the sincere and SOP model predict the justice will grant review; 0 otherwise. *Sincere Deny* takes on a value of 1 if both models predict the justice will deny review; 0 otherwise.²⁰

If justices play the SOP game, *Sophisticated Deny* justices should be less likely to grant review than *Sincere Grant* justices. That is, the coefficient on *Sophisticated Deny* should be negative and statistically significant when compared to the baseline *Sincere Grant*.²¹ Conversely, *Sophisticated Grant* justices should be more likely to grant review than *Sincere Deny* justices, meaning the coefficient on *Sophisticated Grant* should be positive and statistically significant when compared to the baseline *Sincere Deny*.

I control for other factors that are likely to influence justices' agenda votes as well. My source for these controls are the preliminary cert pool memos written in each case.²² To control for *Political Salience*, I counted the total number of amicus curiae briefs (Owens and Epstein 2005) filed both in support of and in opposition to

¹⁹Recalling Figure 2, justices to the left of τ_1 are expected to cast sophisticated denials while justices to the right of τ_2 are expected to cast sophisticated grants.

²⁰In other words, these are specified cutpoints whereby a justice to one side casts a vote one way while a justice on the other side is expected to cast a different vote. As I discuss more fully in the conclusion, it is possible that measurement error has precluded scholars from finding evidence of an SOP influence. If the cutpoint is somehow modeled incorrectly or there is too much error around ideal point estimates, our models may not be able to capture the precision potentially necessary to find SOP influence, especially when, as here, the covariates of interest are binary in nature.

²¹*Sophisticated Deny (Grant)* justices are compared against the baseline *Sincere Grant (Deny)* justices to ensure that I do not pool the wrong justices in my statistical model. That is, if I simply included dummy variables for sophisticated grant and sophisticated deny, I would be comparing both to justices expected to cast sincere grants and those expected to cast sincere denials.

²²For terms prior to the creation of the cert pool, I read through the cert memos written by Justices Burton's and Douglas's law clerks. I supplemented my own data with those collected by Epstein, Segal, and Spaeth (2007).

the petition for certiorari, as discussed in the pool memo. *Intermediate Dissent* takes on a value of 1 if the pool memo in the case notes a dissent in the court below; 0 otherwise. *Intermediate Reversal* equals 1 if the pool memo states that the intermediate court reversed the tribunal below it; 0 otherwise. *Intermediate Conflict* equals 1 if the pool writer noted a conflict in the circuits over the correct interpretation and/or application of federal law; 0 otherwise. I further controlled for the position of the Solicitor General. If the SG requested that review be granted (either as petitioner or as an amicus advocating the grant of review), *U.S. Supports Petition* takes on a value of 1; 0 otherwise. If the SG was respondent or filed an amicus brief opposing review, *U.S. Opposes Petition* takes on a value of 1; 0 otherwise.²³ I also control for whether the lower court struck down a statutory provision. If the pool memo writer noted such behavior in the lower court, *Intermediate Strike* equals 1. Finally, I control for whether the Court is asked to review landmark legislation. If, in his review of landmark legislation, Stathis (2003) notes that the public law which created the statute was major legislation, *Landmark Legislation* takes on a value of 1; 0 otherwise.

Results

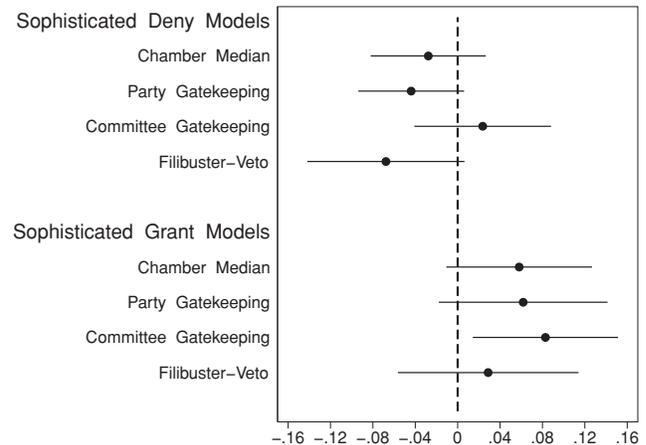
To determine whether justices cast sophisticated SOP-induced agenda votes, I estimate four probit regression models—one for each model of legislative decision making—with robust standard errors clustered on justice.²⁴ The statistical results from these models are presented in Table 2 and predicted probabilities are plotted in Figure 4.

The first numerical column in Table 2 shows the results of the *Sophisticated Deny* justices under the chamber median model of legislative decision making. The key variable of interest in this column is *Sophisticated Deny*, which compares justices expected to deny review (because of legislative preferences) to the baseline category *Sincere Grant*. If justices play

²³The Court sometimes calls for the views of the Solicitor General, at which point the SG's office essentially is forced to enter the case. Controlling for invitations does not change my results.

²⁴Rather than fit eight separate regression models, four of which simply omit an independent variable, I estimate four models (sophisticated deny models) and use Wald tests to examine whether *Sophisticated Grant* justices are more likely to vote to grant review than *Sincere Deny* justices.

FIGURE 4 Predicted Probabilities in the Difference between Sophisticated Denials versus Sincere Grants, as Well as Sophisticated Grants versus Sincere Denials, per Legislative Model



The solid dot is the point estimate, and the horizontal whiskers represent 95% confidence intervals around that estimate. These values were calculated using `prvalue` in the `SPost` series of commands implemented in `Stata 10` by Long and Freese (2006). All other variables are held at their mean or median values.

the SOP game, the coefficient on *Sophisticated Deny* should be negative and statistically significant, telling us that these justices are less likely to vote to grant review than their *Sincere Grant* colleagues. The coefficient, while negative, does not approach conventional levels of statistical significance. Indeed, Table 2 shows that under every model of legislative behavior tested, justices failed to cast sophisticated deny votes. Under the chamber median model, the party gatekeeping model, and the filibuster-veto model, the coefficient was in the expected direction but never reached conventional levels of significance. In the committee gatekeeping model, the sign on *Sophisticated Deny* is actually *positive*.

Figure 4 graphically presents the results, showing the difference in the predicted probabilities between *Sophisticated Deny* and *Sincere Grant* (as well as the difference in predicted probabilities between *Sophisticated Grant* and *Sincere Deny*) in each legislative model. For example, under the chamber median model, the predicted probability a *Sincere Grant* justice votes to grant review is 0.225 [0.166, 0.285] while the probability a *Sophisticated Deny* justice votes to grant review in the same case is 0.198 [0.133, 0.263], a -0.028 [$-0.082, 0.027$] decrease in the predicted

probability of a grant vote. The interval around the average difference between the predicted probabilities contains 0, however, which precludes us from rejecting the null hypothesis that there is no separation of powers influence. Indeed, Figure 4 shows that the average difference between the predicted probability of *Sophisticated Deny* and *Sincere Grant* is *never* statistically significant in any of the legislative models. In short, the data show that justices do not systematically avoid cases as strategic SOP theory claims.²⁵

The results for the sophisticated grant models also show little sign of an SOP influence. Wald tests indicate that under the chamber median model ($\text{Pr} > \chi^2 = 0.11$), the party gatekeeping model ($\text{Pr} > \chi^2 = 0.14$), and the filibuster-veto model ($\text{Pr} > \chi^2 = 0.43$), there is no statistically significant difference between *Sophisticated Grant* and *Sincere Deny* justices. Figure 4 shows that the average differences between the predicted probabilities of sophisticated granting and sophisticated denying are never statistically significant in three out of four models.

The Wald statistic does, however, show a statistically significant difference between *Sophisticated Grant* and *Sincere Deny* justices under the committee gatekeeping model ($\text{Pr} > \chi^2 = 0.02$). Upon first glance, the positive and statistically significant result on the *Sophisticated Grant* variable suggests that justices who would ordinarily deny review to the case instead vote to force the case on the Court's docket and use the override threat to leverage policy output. Upon deeper analysis, however, these results do not hold up. The statistically significant coefficient on *Sophisticated Grant* in the committee gatekeeping model is simply an artifact of Justice White's voting behavior. White voted to grant review with alacrity (Perry 1991) and frequently dissented from the denial of cert because he thought the Court had an obligation to hear even those cases with the slightest of conflicts in the circuits.²⁶ Simply put, White often voted to grant review to cases even when he was closer to the status quo than to the Court median—presumably for legal reasons (Black and Owens 2009a). Thus it is not that White switched his vote from a sincere deny to a sophisticated grant but, rather, that his sincere vote was a grant to begin

with.²⁷ When I remove White from the analysis and refit the model, the coefficient on *Sophisticated Grant* falls out of statistical significance.²⁸ What looks like a victory for the strategic SOP model in this one instance turns out to be nothing other than White's decisions to grant review to cases even when he was ideologically closer to the status quo than to the median justice.

Nevertheless, as a further check on this dynamic, I analyzed justices' votes from the terms in which the Court was theoretically constrained under *every* model of legislative decision making. I estimated separate models for each theory of legislative decision making and compared the Bayesian Information Criteria (BIC) derived therefrom. The filibuster-veto model offered the smallest BIC value, suggesting that it provides the best fit for the data (Primo, Binder, and Maltzman 2008). Thus, even if the positive coefficient on *Sophisticated Grant* in the committee gatekeeping model was not simply an artifact of Justice White's agenda-setting proclivities, the BIC test suggests that the committee gatekeeping model would not be the best model on which to rely anyhow.

While the key independent variables did not perform as the SOP model predicts, most of the controls performed as expected.²⁹ Justices were more likely to grant review as the number of amicus curiae briefs filed at the agenda-setting stage increased, when there was legal conflict below, and when the lower court exercised judicial review. The Solicitor General's position mattered in most of the models as well.

Discussion

Strategic approaches toward explaining the choices justices make now dominate public law scholarship. And rightly so. The data show time and again that justices' decisions depend not only on their preferences, but also on the preferences and expected reactions of their colleagues. Justices strategically determine which cases to hear based on their likely success on the merits (Black and Owens

²⁵These results hold up under alternative specifications of the standard errors. I refit every model using asymptotic standard errors, robust standard errors, and robust standard errors clustered on docket. None produced results supportive of the SOP model.

²⁶Stern et al. (2002) show that White dissented from the denial of cert 67 times during the 1989 term and over 90 times in the 1991, term, largely based on his view that the lower courts impermissibly conflicted over the proper interpretation of federal law and the Court had an obligation to hear those cases.

²⁷For an examination of the conditions under which justices engage in such behavior, see Black and Owens (2009a).

²⁸When I refit the model using asymptotic standard errors ($\text{Pr} > |z| = 0.223$), nonclustered robust standard errors ($\text{Pr} > |z| = 0.219$), or robust standard errors clustered on the docket ($\text{Pr} > |z| = 0.363$), the coefficient falls out of significance.

²⁹Indeed, models estimated without the congressional control variables outperform those that include them. In every BIC comparison of SOP models to controls-only models, there is always an absolute value difference between the models that provides "very strong" support for a non-SOP model of agenda setting (Long and Freese 2006, 113).

2009a; Caldeira, Wright, and Zorn 1999). They exercise foresight when assigning opinions, responding to drafts, and joining majority coalitions (Maltzman, Spriggs, and Wahlbeck 2000). And, they observe strategic considerations when determining whether to write separate opinions (Wahlbeck, Spriggs, and Maltzman 1999). Nonetheless, the results of this study suggest that there is little reason to believe that justices are strategic SOP agenda setters.

This study is the first systematic, empirical analysis that relies on archival data to examine whether legislative and executive preferences influence justices' agenda votes. The approach taken here not only avoids the selection bias that may occur when researchers focus exclusively on the Court's merits decisions, but it also provides a rigorous test of the SOP approach by analyzing the stage where influence is most likely to be found. The results are compelling. Across every model of legislative decision making tested, justices who were expected to play the SOP game failed to do so. The one model that offered hope for the SOP argument fell apart upon deeper inspection. Simply put, the data provide no evidence to support the strategic SOP model. Since the agenda stage is precisely where such evidence is most likely to be found, these results provide a strong rejoinder to SOP models.

One may wonder *why* justices do not play the SOP game. One answer is that the game simply is too complex to allow for accurate predictions. Segal (1997) points out that the legislative process contains too many veto points for justices to foresee what will happen to their opinions. Indeed, today's dominant coalitions may be gone tomorrow. Issues that are salient one day may become moot the next. Thus, the best option for justices may be to focus their strategic behavior on judicial colleagues, whose actions are more familiar and predictable.

A second answer turns on justices' institutional roles and powers. The constitution offers justices lifetime tenure so long as they exhibit good behavior. It is altogether reasonable that justices might believe it to be constitutionally patronizing—not to mention, unnecessary—for them to tiptoe around Congress and the president. Besides, even if the elected branches respond with legislation, the Court often has the power to examine that response (see, e.g., *City of Boerne v. Flores*, 521 U.S. 507 [1997]).

Of course, a third answer is that justices *do* play the SOP game, but the conditions under which they do so are so limited or difficult to measure that existing methodologies are blind to it. All measures come with error; if the dividing line between strategic and sincere behavior is razor sharp, our current measurements may not be sophisti-

cated enough to detect such behavior. It is further possible that justices play the game using instruments heretofore unstudied. For example, perhaps justices use particular types of interpretive devices (e.g., legislative history versus plain meaning) to avoid punitive overrides. Perhaps they can forestall hostile responses by writing quality legal opinions. Or, perhaps some justices actually seek out overrides when they are outvoted on the Court (Spiller and Tiller 1996). These and other questions must be addressed before we can close the door on strategic SOP claims. Nevertheless, after looking for evidence of SOP influence in one of the likeliest of places—the agenda stage—and, finding none, the weight of scholarship now firmly rests against the strategic SOP model.

References

- Bailey, Michael A. 2007. "Comparable Preference Estimates Across Time and Institutions for the Court, Congress, and Presidency." *American Journal of Political Science* 51(3): 433–48.
- Bailey, Michael A., Brian Kamoie, and Forrest Maltzman. 2005. "Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making." *American Journal of Political Science* 49(1): 72–85.
- Benesh, Sara C., Saul Brenner, and Harold J. Spaeth. 2002. "Aggressive Grants by Affirm-Minded Justices." *American Politics Research* 30(3): 219–34.
- Bergara, Mario, Barak Richman, and Pablo T. Spiller. 2003. "Modeling Supreme Court Decision Making: The Congressional Constraint." *Legislative Studies Quarterly* 28(2): 247–80.
- Black, Ryan C., Anthony J. Madonna, Ryan J. Owens, and Michael S. Lynch. 2007. "Adding Recess Appointments to the President's 'Tool Chest' of Unilateral Powers." *Political Research Quarterly* 60(4): 645–54.
- Black, Ryan C., and Ryan J. Owens. 2009a. "Agenda-Setting in the Supreme Court: The Collision of Policy and Jurisprudence." *Journal of Politics* 71(3): 1062–1075.
- Black, Ryan C., and Ryan J. Owens. 2009b. "Join-3 Votes and Supreme Court Agenda Setting." Unpublished manuscript, Michigan State University.
- Black, Ryan C., and Ryan J. Owens. 2009c. "Solicitor General Influence and the United States Supreme Court." Paper presented at the annual meeting of the Southern Political Science Association.
- Black, Ryan C., and Ryan J. Owens. 2010. "Analyzing the Reliability of Supreme Court Justices' Agenda Setting Records." *Justice System Journal* 30(3): 254–64.
- Bonneau, Chris W., Thomas H. Hammond, Forrest Maltzman, and Paul J. Wahlbeck. 2007. "Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court." *American Journal of Political Science* 51(4): 890–905.

- Boucher, Robert L., Jr., and Jeffrey A. Segal. 1995. "Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court." *Journal of Politics* 57(3): 824–37.
- Brace, Paul, Melanda Gann Hall, and Laura Langer. 1998. "Judicial Choice and the Politics of Abortion: Institutions, Context, & the Autonomy of Courts." *Albany Law Review* 62(4): 1265–1303.
- Brennan, William J., Jr. 1973. "The National Court of Appeals: Another Dissent." *University of Chicago Law Review* 40(3): 473–85.
- Caldeira, Gregory A., and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *American Political Science Review* 82(4): 1109–27.
- Caldeira, Gregory A., John R. Wright, and Christopher J.W. Zorn. 1999. "Sophisticated Voting and Gate-Keeping in the Supreme Court." *Journal of Law, Economics, & Organization* 15(3): 549–72.
- Carrubba, Clifford, Barry Friedman, Andrew D. Martin, and Georg Vanberg. 2007. "Does the Median Justice Control the Content of Supreme Court Opinions?" Presented at the Second Annual Conference on Empirical Legal Studies.
- Cox, Gary W., and Mathew D. McCubbins. 2005. *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives*. New York: Cambridge University Press.
- Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6(2): 279–95.
- Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland. 2007. "The Judicial Common Space." *Journal of Law, Economics, & Organization* 23(2): 303–25.
- Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, DC: CQ Press.
- Epstein, Lee, Jack Knight, and Andrew D. Martin. 2001. "The Supreme Court as a Strategic National Policymaker." *Emory Law Journal* 50(2): 583–612.
- Epstein, Lee, Jeffrey A. Segal, and Harold J. Spaeth. 2007. "Digital Archive of the Papers of Harry A. Blackmun." Available online at <http://epstein.law.northwestern.edu/research/BlackmunArchive/>.
- Epstein, Lee, Jeffrey A. Segal, and Jennifer Nicoll Victor. 2002. "Dynamic Agenda Setting on the U.S. Supreme Court: An Empirical Assessment." *Harvard Journal on Legislation* 39(2): 395–433.
- Epstein, Lee, Jeffrey A. Segal, and Timothy Johnson. 1996. "The Claim of Issue Creation on the U.S. Supreme Court." *American Political Science Review* 90(4): 845–52.
- Eskridge, N. William, Jr. 1991. "Overriding Supreme Court Statutory Interpretation Decisions." *Yale Law Journal* 101(2): 331–455.
- Gely, Rafael, and Pablo T. Spiller. 1990. "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases." *Journal of Law, Economics, & Organization* 6(2): 263–300.
- Giles, Michael W., Virginia A. Hettinger, and Todd Peppers. 2001. "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas." *Political Research Quarterly* 54(3): 623–41.
- Ginsburg, Ruth Bader. 1994. "Address to the Annual Dinner of the American Law Institute—May 19, 1994." *American Law Institute Proceedings* 71: 324–31.
- Hammond, Thomas H., Chris W. Bonneau, and Reginald S. Sheehan. 2005. *Strategic Behavior and Policy Choice on the U.S. Supreme Court*. Stanford, CA: Stanford University Press.
- Hansford, Thomas G., and David F. Damore. 2000. "Congressional Preferences, Perceptions of Threat, and Supreme Court Decision Making." *American Politics Quarterly* 28(4): 490–510.
- Harvey, Anna, and Barry Friedman. 2006. "Pulling Punches: Congressional Constraint on the Supreme Court's Constitutional Rulings, 1987–2000." *Legislative Studies Quarterly* 31(4): 533–62.
- Harvey, Anna, and Barry Friedman. 2009. "Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court's Agenda." *Journal of Politics* 71(2): 574–92.
- Hettinger, Virginia A., and Christopher Zorn. 2005. "Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court." *Legislative Studies Quarterly* 30(1): 5–28.
- Krehbiel, Keith. 1995. "Cosponsors and Wafflers from A to Z." *American Journal of Political Science* 39(4): 906–23.
- Krehbiel, Keith. 1998. *Pivotal Politics*. Chicago: University of Chicago Press.
- Long, J. Scott, and Jeremy Freese. 2006. *Regression Models for Categorical Dependent Variables Using Stata*. 2nd ed. College Station, TX: Stata Press.
- Lynch, Michael. 2005. "Are They Asking the Right Questions? Assessing Interest Group Scores Using Item Response Theory." Paper presented at the 2005 annual meeting of the Midwest Political Science Association.
- Maltzman, Forrest, James F. Spriggs, II, and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. New York: Cambridge University Press.
- Martin, Andrew D., Kevin Quinn, and Lee Epstein. 2005. "The Median Justice on the U.S. Supreme Court." *North Carolina Law Review* 83(5): 1275–1322.
- McGuire, Kevin T., and Barbara Palmer. 1995. "Issue Fluidity on the U.S. Supreme Court." *American Political Science Review* 89(3): 691–702.
- Owens, Ryan J., and Lee Epstein. 2005. "Amici Curiae During the Rehnquist Years." *Judicature* 89(3): 127–33.
- Perry, H. W., Jr. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.
- Poole, Keith, and Howard Rosenthal. 1997. *Congress: A Political-Economic History of Roll-Call Voting*. Oxford: Oxford University Press.
- Primo, David A., Sarah A. Binder, and Forrest Maltzman. 2008. "Who Consents? Competing Pivots in Federal Judicial Selection." *American Journal of Political Science* 52(3): 471–89.
- Rehnquist, William H. 1987. *The Supreme Court: How It Was, How It Is*. New York: William Morrow.
- Riker, William H. 1962. *The Theory of Political Coalitions*. New Haven, CT: Yale University Press.

- Sala, Brian R., and James F. Spriggs, II. 2004. "Designing Tests of the Supreme Court and the Separation of Powers." *Political Research Quarterly* 57(2): 197–208.
- Segal, Jeffrey A. 1997. "Separation-of-Powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91(1): 28–44.
- Segal, Jeffrey A., and Chad Westerland. 2005. "The Supreme Court, Congress, and Judicial Review." *North Carolina Law Review* 83: 101–66.
- Smith, Steven S. 1989. *Call to Order: Floor Politics in the House and Senate*. Washington, DC: Brookings.
- Smith, Steven S. 2007. *Party Influence in Congress*. Cambridge: Cambridge University Press.
- Snyder, James M., Jr. 1992. "Artificial Extremism in Interest Group Ratings." *Legislative Studies Quarterly* 17(3): 319–45.
- Spiller, Pablo T., and Emerson H. Tiller. 1996. "Invitations to Override: Congressional Reversal of Supreme Court Decisions." *International Review of Law and Economics* 16(4): 503–21.
- Spiller, Pablo T., and Rafael Gely. 1992. "Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988." *RAND Journal of Economics* 23(4): 463–92.
- Spriggs, James F., II, and Thomas G. Hansford. 2001. "Explaining the Overruling of U.S. Supreme Court Precedent." *Journal of Politics* 63(4): 1091–1111.
- Stathis, Stephen W. 2003. *Landmark Legislation, 1774-2002*. Washington, DC: CQ Press.
- Stern, Robert L., Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller. 2002. *Supreme Court Practice*. 8th ed. Washington, DC: The Bureau of National Affairs.
- Wahlbeck, Paul J., James F. Spriggs, II, and Forrest Maltzman. 1999. "The Politics of Dissents and Concurrences on the U.S. Supreme Court." *American Politics Quarterly* 27(4): 488–514.
- Ward, Artemus, and David L. Weiden. 2006. *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. New York: New York University Press.
- Yalof, David A. 2003. *The Presidency and the Political System*. Washington, DC: Congressional Quarterly Press.