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Abstract

Debate within judicial politics scholarship continues to focus on whether, and to what extent, the separation of powers system affects U.S. Supreme Court decision making. While both formal and empirical work points to such an effect, the literature has not addressed a fundamental part of this process—namely, how justices learn about the preferences or possible reactions of Congress to potential Court decisions. In this article, we provide an answer by demonstrating justices use their limited time during oral arguments to seek such information. Specifically, using data from all orally argued cases between 1979 and 2003, we show that justices raise questions about Congress more often as the level of external constraint increases.

Keywords

U. S. Supreme Court, oral arguments, separation of powers

During oral arguments in *Citizens United v. FEC*,[1] Justice Ginsburg interrupted the appellant's attorney, Theodore Olson, 1 minute and 38 seconds

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into his argument.[2] In so doing she posed two related questions. The first was meant to distinguish between the rights of corporations and individuals under the First Amendment. The second inquired about the role of Congress in this debate and is of particular interest to us because of its direct request for information about the power of Congress to legislate campaign finance reform. As Ginsburg put it, "[I]s there any distinction that Congress could draw between corporations and natural human beings for purposes of campaign finance?"

Ginsburg was not the only justice to show concern for Congress. Indeed, Justice Breyer referenced Congress in a different manner as he asked about the extent to which its members believed a compelling interest existed in this situation. More to the point, he asked Olson whether Citizens United wanted the Court to second-guess Congress:

> … is the argument in this case about the existence of a compelling interest? Because Congress seemed to think that there was certainly that; it's this concern about the perception that people are, say, buying candidates. Are we arguing about narrow tailoring? Congress thought it was narrow tailoring. Or are we arguing about whether we should second-guess Congress on whether there is enough of a compelling interest and the tailoring is narrow enough?

Breyer and Ginsburg seemed to believe understanding Congress's perspective was important enough that they were willing to use the limited time available during oral arguments to raise questions about this coordinate branch of government. Of course there were slight differences. Ginsburg's question focused on what Congress could do—presumably in the future—when making laws about corporations, while Breyer asked point blank about the extent to which the Court should second guess congressional will.

The oral arguments in *Citizens United* are not unique. Indeed, the justices raise questions about congressional preferences and behavior in many other cases. While we could provide numerous examples of this phenomenon, consider a few additional pieces of evidence. In *Dayton v. Hanson*,[3] the Court was clearly cognizant of Congress as one justice asked, "Do you think that we owe any special measure of respect to the Congress, that is most intimately concerned with the Speech and Debate Clause, with their view that this is, the legislation is compatible with that clause?" Similarly, in *Cleveland v. United States*,[4] a justice engaged counsel about whether Congress's decision to take no action regarding the justices' past interpretation of a mail fraud statute should be taken as an important indication of Congress's views

on this topic: "How many years since *McNally*?" The attorney responded: "13 years. That was decided in 1987." The justice continued: "So we can assume that someone in Congress knew of this Court's interpretation and could have done something about it if it disagreed."[5] Our general point is that references to Congress during Supreme Court oral arguments reveal that justices consider information regarding Congress relevant and important as they decide cases.[6]

More specifically, these anecdotes lead us to ask why, given the independence of the Supreme Court, would justices allocate the limited time available to them during oral arguments to gather information about congressional intent and preferences? Here we provide one answer to this important question. To do so we begin by making it clear why the Court must be concerned with the separation of powers and how oral arguments may affect decisions justices make. Based on what these literatures teach us, we posit several hypotheses about when we expect justices to raise questions about Congress during oral arguments. Next we discuss the data we use to test the hypotheses. Finally, we present our results and offer concluding remarks about what our findings add to our understanding of judicial decision making and the Court's relationship with the the legislature.

The Separation of Powers and Supreme Court Decision Making

Political scientists have long debated whether and to what extent the separation of powers system affects the Supreme Court's decision making process. At its core, this perspective asserts justices must consider the preferences of the coordinate branches of government in order to succeed in their goal of setting lasting legal policy (e.g., Epstein & Knight, 1998; Johnson, 2003). More specifically, this approach suggests the justices must act in this way because they control neither the purse nor the sword (Clark, 2009; Epstein & Knight, 1998; Eskridge, 1991a, 1991b; Ferejohn & Weingast, 1992; Gely & Spiller, 1990; Harvey & Friedman, 2006; Marks, 1989).[7] As such, if the justices find themselves at odds with Congress (or the president), the Court may face retribution for unwelcome decisions.

Congress, according to this perspective, is in a position to take action against the Court, which would restrict the justices' ability to set policy effectively. This action may take two major forms. First, Congress may attempt to override specific Court decisions with which it disagrees, thereby curtailing the Court's ability to further its legal and policy goals. To avert such action the justices would, theoretically, look ahead to this potential threat and

attempt to avoid making decisions they anticipate would be overridden (Epstein, Knight, & Martin, 2001). The Court's concern over potential overrides is labeled the *rational anticipation model* by Segal, Westerland, and Lindquist (2011).

Second, Congress is in a position to sanction the Court in a number of ways that strike a more painful blow to the Court's institutional legitimacy than a simple override. These include reducing the Court's appellate jurisdiction, cutting the Court's budget, or simply ignoring decisions (Eskridge, 1991b; Rosenberg, 1992; Segal et al., 2011).[8] As a result, recent scholarship proposes that it is in fact concern over maintaining institutional legitimacy that incentivizes justices' consideration of Congress and the president as they make decisions. Under this conceptualization, the Court may still work to anticipate reactions from Congress when it senses its legitimacy may be in jeopardy, but the anticipated congressional responses would be tactics aimed at the Court's institutional standing more broadly, rather than at an override. This theoretical mechanism is dubbed the "institutional maintenance model" by Segal et al. (2011).

Empirically, Congress has engaged in such attacks on the Court's institutional legitimacy; the 2-year moving average of proposed Court-curbing bills was at or above 20 during four time periods since 1880—although this average fluctuates over time (Clark, 2009). Furthermore, from time to time, Congress does ignore the Court. Indeed, it has repeatedly ignored *INS v. Chadha*,[9] which held the legislative veto unconstitutional. In fact, more than 140 bills with a legislative veto provision were signed into law in the 5 years after *Chadha* (Tolchin, 1989).[10]

This arsenal of congressional tools has the potential to severely limit the Court's ability to set lasting policy and, according to Clark (2009), even an *attempted* use of these tools signals a threat to the Court's institutional legitimacy. As a result, Clark (2009) asserts justices' behavior is motivated in part by their concern over the Court's institutional legitimacy since public support serves as a crucial component of the Court's ability to overcome its lack of enforcement capacity (e.g., Caldeira, 1986; Murphy, 1964). That is, given Congress's closer connection to citizens, Clark contends justices look to Congress for an indication of the Court's legitimacy. His results demonstrate the Court responds to signals from Congress, which take the form of an increase in Court-curbing bills proposed, by decreasing the number of congressional statutes it invalidates via judicial review in a given year (Clark, 2009).[11] Similarly, Clark's results indicate a more direct connection between the people and the Court; the justices strike fewer laws in a given year as public support for the Court decreases. The point, Clark argues, is that when the justices believe the legitimacy of the Court is threatened, they alter their

behavior by limiting the frequency with which they overturn congressional statutes (in which the public presumably has a stake).

Segal et al. (2011) test for the influence of both the rational anticipation and institutional maintenance models on the likelihood the Court will strike down a law and find support for the latter model. This, combined with Clark's evidence, leads us to take the theoretical position that justices are motivated by a desire to maintain the Court's institutional legitimacy and thereby its ability to establish lasting legal policy. As Murphy (1962) notes, this is clearly an important consideration: "If a judge wishes, for example, to protect constitutional rights rather than write libertarian tracts, he must try to visualize the possible reactions of other branches of government to any decision" (p. 263). In other words, justices are, and should be, cognizant of how Congress views the Court and its potential actions so that the Court may exhibit deference when needed (i.e., when its legitimacy is threatened or weak). We agree and submit that justices' need for such information incentivizes the use of the Court's most direct method of gathering information—oral arguments—to fill this need.

Using Oral Arguments to Gather Information About Congress

To ensure that their decisions are followed and do not jeopardize the Court's institutional standing, justices need information about the political landscape and the relative safety of the Court's institutional legitimacy. The question that piques our interest is how they obtain such information. In this section, we provide our answer: the oral arguments justices hear in each case. To do so, we make two key points. First, these proceedings generally provide important information to the justices and therefore affect how they decide. Second, oral arguments provide an excellent (and first) opportunity for the justices to learn about the coordinate branches.

We begin by examining the information justices usually possess about the elected branches prior to oral arguments in a give case. Certainly, they gather such information from many sources including litigant briefs (Epstein & Kobylka, 1992), briefs *amici curiae* (Spriggs & Wahlbeck, 1997), briefs on *certiorari* (Caldeira & Wright, 1988), and lower court opinions. However, as Johnson (2004) argues, few of these sources provide explicit information about Congress, the president, or other external actors; in his sample of cases, only 9% of all briefed arguments focus on preferences of external actors.[12] In short, despite the clear need for information about the preferences of Congress, in most cases justices do not receive direct communication about how a decision will be received beyond their ivory tower.[13]

Thus, a problem arises if justices believe they need information about the legislature but such information is not readily available prior to a case's appearance on the Court's docket. The question, then, is how can justices gather this information? Our answer stems from evidence accumulated over the last decade that establishes oral arguments play an integral role in the Court's decision making process (Johnson, 2004; Wrightsman, 2008). Indeed, there are myriad ways this 1-hour conversation between Court and counsel influences the outcome of cases. Justices, for example, use these proceedings to gather additional information not contained in the litigants' briefs (Johnson, 2004; Wasby, D'Amato, & Metrailer, 1977). Such information includes the facts of the case, pertinent precedent and, of interest to us here, how Congress might respond if the Court decides in a particular way.

For our purposes, Johnson (2004) demonstrates that approximately one third of justices' questions during oral arguments relate to the preferences of external actors and nearly all of them raise issues not addressed in the litigant or *amici* briefs. While compelling to us, his findings are limited because they are based on only 75 civil liberties cases decided during the Burger Court era. Furthermore, while Johnson demonstrates justices' interest in information about Congress, he does not explore the factors that may lead them to raise such questions. We seek to do so here.

Hypotheses

In the remainder of the article, we extend Johnson's (2004) analysis by testing a series of hypotheses that focus on the conditions under which we expect justices to use oral arguments as a resource to gather information about Congress. In particular, based on the institutional maintenance model of the separation of powers (Segal et al., 2011), we contend there are several factors tied to the Court's desire to establish lasting public policy and to maintain its legitimacy that may influence the degree to which justices ask questions about Congress during oral arguments.

The institutional maintenance model suggests the Court's location relative to the legislature in a liberal-conservative policy space determines whether the Court is insulated from attacks on its legitimacy, or alternatively, whether it may be vulnerable to attack. Segal et al. (2011) find that the Court responds to its general spatial location relative to Congress rather than to a policy-specific motivation tied to a pivotal actor with the ability to overturn the Court's decisions. Their results indicate that, when the Court finds itself between the medians of both chambers of Congress (thereby insulting it from congressional attacks on the Court's legitimacy), the justices are more likely to strike down a law. Specifically, when the Court faces external constraint

and is therefore institutionally vulnerable, it should "ratchet back confrontational behavior with Congress" (Segal et al., 2011, p. 93).

For us, such a constraint may contribute to justices' decision to seek information about Congress (e.g., Clark, 2009; Epstein & Knight, 1998; Eskridge, 1991a, 1991b; Harvey & Friedman, 2006). That is, when the Court is advantageously positioned between the other branches, the justices should be less likely to discuss congressional preferences during oral arguments. On the other hand, justices have greater incentive to inquire about the preferences of Congress when the Court's position is more ideologically extreme than pivotal members of the legislature.[14] This leads us to hypothesize the following:

> *External Constraint Hypothesis*: Justices are more likely to ask questions about Congress during arguments as the level of external constraint increases.

Beyond a general barometer of potential vulnerability, the Court may pay attention to a more specific indication of the Court's institutional vulnerability: the frequency of congressional Court-curbing attempts. Clark (2009, p. 979) describes a typical Court-curbing bill as an "institutional assault" on the Court. Such congressional attacks may signal the absence of support for specific decisions, which in turn indicates the Court's institutional standing may be tenuous. Clark goes on to explain that the Court looks to the legislature for such signals because of its members' direct electoral connection with citizens and that justices respond to increases in congressional Court-curbing attempts by subsequently decreasing the number of laws they deem unconstitutional. We argue that if Congress increasingly signals a weakening institutional position, justices may choose to allocate the limited time during oral arguments to raise questions about Congress in an attempt to head off further degradation of its legitimacy.[15] As such, we hypothesize the following:

> *Court-Curbing Hypothesis*: Justices are more likely to raise questions about Congress as the number of Court-curbing attempts by Congress increases.

Clark's findings also reveal a relationship between public support for the Court and the number of times the justices find laws unconstitutional. He finds that as public support for the Court decreases, so too do the number of laws it strikes as unconstitutional (Clark, 2009). For our purposes, this raises the possibility that decreased public support for the Court may increase the pressure on the justices to be more attentive to the preferences of elected officials. While a decrease in public support alerts the Court to a potential

vulnerability, it does not send a clear signal about where Congress stands or about its willingness to take action. As a result, we believe this indication from the public of increasing dissatisfaction may make justices more concerned about how their decisions may be received by Congress, and thus, we hypothesize the following:

Public Support for the Court Hypothesis: Justices are more likely to raise questions about Congress as public dissatisfaction with the Court increases.

The degree to which external constraint signals the Court's legitimacy is vulnerable may also be related to public support for Congress or for the Court. Segal et al. (2011) assert that under the institutional maintenance model, justices must be attuned to "when they might be in institutional danger" (p. 93). This may involve more than the Court's ideological position relative to the elected branches. Congress's ability to threaten the Court's legitimacy may be limited by its own institutional standing. If the Court is theoretically constrained due to its ideological extremity but Congress's institutional standing is weak, Congress's capacity to affect the Court's legitimacy may be relatively minimal. Similarly, a relatively high level of institutional legitimacy for the Court may lead the justices to be more confident in the Court's current level of authority and therefore less concerned about external constraint. This leads to the following conditional hypotheses:

Conditional Constraint Hypothesis-Congress: Justices are more likely to raise questions about Congress when constrained *and* when public dissatisfaction with Congress is low rather than high.

Conditional Constraint Hypothesis-Court: Justices are more likely to raise questions about Congress when constrained *and* public dissatisfaction with the Court is high rather than low.

Like Segal et al. (2011), we test these hypotheses simultaneously to determine the extent to which each affects our phenomenon of interest—namely how often justices ask about the preferences of Congress.

Data and Methods

To test our hypotheses, we turn to the transcripts of Supreme Court oral arguments. Our data are the 2,643 oral arguments beginning with the 1979 term and ending with the 2003 term.[16] We downloaded each transcript from Lexis-Nexis and analyzed the words spoken by the justices in these cases—a universe of

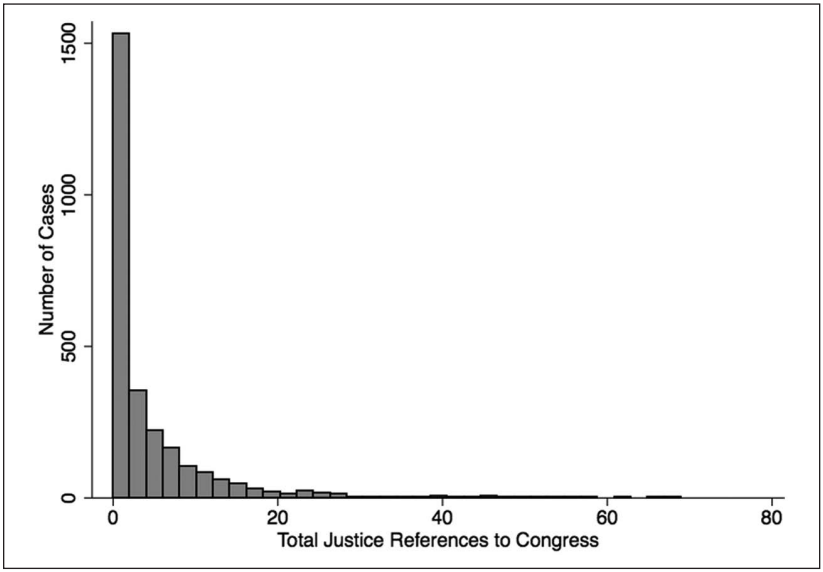

Figure 1. Justices' references to Congress during oral argument

over 7 million total words—and counted the number of times a justice made a reference to Congress in each case. In particular, we searched for Congress*, legislature, legislat*, Senate, and House of Representatives, where * denotes a wildcard for zero or more characters.[17] Thus, a search for "congress*" would return either "congress" or "congressional."[18]

The unit of analysis is the justices' behavior in each of our 2,643 cases, and the dependent variable is *number of Congress words*, which is a count of the total times any justice uses these words during oral argument in a given case.[19] The discrete nature of this variable makes linear regression an inappropriate modeling choice. Rather, an event count model is a better option. Additionally, its skewed nature, depicted in Figure 1, makes our model choice clear. Indeed, of the 2,643 observations, 950 have zero references to Congress. Furthermore, its standard deviation is 7.65, which is greater than its mean of 4.59. This means a Poisson model (which is a possible choice for a count variable) would produce consistent but inefficient estimates as well as downwardly biased standard errors (Long, 1997, p. 230). For these reasons, we use a Negative Binomial Regression model (Greene, 2002; Long, 1997), which accounts for the overdispersion of zeros by allowing "the conditional variance of y to exceed its conditional mean" (Long, 1997, p. 230).[20]

The model contains several independent variables to test our hypotheses of interest. First, we create a variable that captures the *Level of External Constraint* faced by the Court. When the Court is located between external actors, it is relatively unconstrained since the external actors' preferences are at cross-purposes (Eskridge, 1991b). Based on the spatial configuration of the Court, the president, and both chambers of Congress, this variable is coded 0 if the Court median is located between the median in at least one chamber of Congress and the president's ideal point. Otherwise, if the Court median is most ideologically extreme relative to the president and the medians in both chambers of Congress, the level of external constraint equals the absolute value of the ideological distance between the Court median and the closest chamber of Congress, using Bailey and Maltzman (2009) scores.[21] We use the distance to the closest chamber of Congress since it is Congress that would most likely initiate any counteraction against decisions made by the Court. This variable ranges from 0 to 0.69, with a mean of 0.089 and a standard deviation of 0.17. We expect each to have a positive relationship with the dependent variable—meaning that as external constraint increases, the justices should be more likely to raise Congress issues.

Second, we test two of Clark's (2009) separation of powers hypotheses that the Court is responsive to specific congressional actions as well as to public support for the Court. *Court Curbing Bills* is the number of bills introduced in either house of Congress from the previous year that seek to limit the Court's power in any way.[22] This variable ranges from 1 to 26 and has a mean of of 6.67 with a standard deviation of 6.6. Based on our hypothesis, we anticipate a positive relationship with the use of Congress words. Furthermore, we include Clark's (2009) measure of *Public Dissatisfaction with the Court* to capture the extent to which the public supports (or does not support) the Court. It is coded as the percentage of respondents in the General Social Survey who had "hardly any" confidence in the Court and ranges from about 10 to 21 during the period under analysis, with a mean of 14.0 and a standard deviation of 2.5.[23] We expect this variable to be positively related to the Court's propensity to raise issues regarding Congress during oral argument.

Next, we use two interaction terms to test whether the influence of external constraint is conditional on the institutional standing of Congress or the Court. Specifically, we create *Public Dissatisfaction with the Court* × *Level of External Constraint* and *Public Dissatisfaction With Congress* × *Level of External Constraint*. To capture dissatisfaction with Congress, we employ a parallel measure of public support—the percentage of respondents in the General Social Survey who had "hardly any" confidence in Congress. It ranges from 18 to 44, with a mean of 27.5 and standard deviation of 7.4.

Beyond our variables of interest, we include several additional valence factors that may affect the degree to which justices ask about Congress during oral arguments (Enelow & Hinich, 1984). First, it is possible justices may be prompted to reference Congress because it is first discussed by an attorney arguing the case. As such, we include *Litigant References*, which is the number of references to Congress by a litigant attorney during oral arguments. It has a mean of 19.22 and a standard deviation of 22.66. We also suspect the justices may be prompted to raise issues by *amicus* participants. Thus, we include *Total Amici Briefs* submitted in a case.[24] Third, we include *Federal Government Party*, which is coded 1 if, according to Spaeth (2006), the federal government was a party to the case and 0 otherwise. In our sample, 843 cases meet this criterion. Additionally, we include a control for cases dealing with a *Federal Issue* based on what Spaeth's (2006) categorization of the issue at stake; 218 cases meet this criteria.

Furthermore, to capture whether the justices are less concerned with the coordinate branches when they decide constitutional cases and more in statutory cases, we include *Statutory Case*, which is coded 1 if the case is primarily based on the interpretation of a federal statute, treaty, court rule, executive order, administrative regulation, or administrative rule according to Spaeth (2006). Alternatively, if a case involves the Court's authority of judicial review at the national or state level we code these as 0 (meaning it is a constitutional case). In our sample, just about half of all cases are coded 1.

Next, we incorporate a dummy variable for the *Solicitor General's Participation* as *amicus curiae* to account for the possibility that the Solicitor General's decision to file an *amicus* brief provokes attention to Congress issues. The Solicitor General participates as *amicus curiae* in approximately 20% of cases in the sample. Finally, if the justices believe a case is legally salient, they may be more wary of Congress. Thus, we include *Legal Salience*, which is coded 1 if the Court ultimately declares a federal law unconstitutional and 0 otherwise.

Results

Table 1 provides the results of our analysis. First, we note the Negative Binomial model, rather than a Poisson, is the appropriate modeling choice. We determined this through a significance test of the alpha coefficient. As Long (1997) notes, "a one-tailed test of H_0: $\alpha = 0$ can be used to test for overdispersion, since when α is zero the Negative Binomial reduces to a Poisson" (p. 237). The results demonstrate that α is greater than zero. Thus, the Negative Binomial is better able to capture our phenomenon of interest

Table 1. Negative binomial regression model of the number of Congress words used by the court during oral arguments

	Coefficient	Robust *SE*
Level of External Constraint	9.877*	1.808
Court-Curbing Bills	–0.008	0.005
Dissatisfaction with the Court	–0.058*	0.023
Dissatisfaction with Congress	0.057*	0.015
Dissatisfaction with Congress X Level of Constraint	–0.291*	0.032
Dissatisfaction with Court X Level of External Constraint	0.093	0.167
Statutory Case	–0.019	0.058
Litigant References	0.042*	0.002
Federal Government as a Party	0.110*	0.043
Total Amici Briefs	0.017*	0.004
Legal Salience	0.189	0.112
Federal Issue	0.110	0.101
Solicitor General Participation as Amicus Curiae	–0.040	0.086
Constant	–0.662*	0.2555
Alpha	0.956*	0.040
N	2643	
Wald $\chi^2(13)$	1,413*	

Note. Standard errors are clustered on term.
*$p < .05$ (two–tailed test).

than a Poisson model. The significant Wald χ^2 test supports this conclusion. We now turn to specific results.

There is clear evidence the Court uses oral arguments to gather information about Congress and its members' preferences when the Court has reason to believe its institutional legitimacy may be in jeopardy. First, as Figure 2 shows, at median levels of dissatisfaction with Congress, the Court is more likely to reference Congress as the level of external constraint increases, supporting the external constraint hypothesis. More specifically, when the Court is unconstrained, justices reference Congress 1.6 times per case. This rate increases to 3.6 mentions when constraint is at the median level among years where the Court is constrained.[25] This difference represents a 125% increase in the propensity of the Court to refer to Congress during oral arguments.[26] Echoing Segal et al.'s (2011) institutional maintenance model, these results suggest the Court is aware of when it may be institutionally vulnerable and takes action to acquire additional information about congressional preferences that may help stabilize its legitimacy or prevent a decline in its institutional standing.

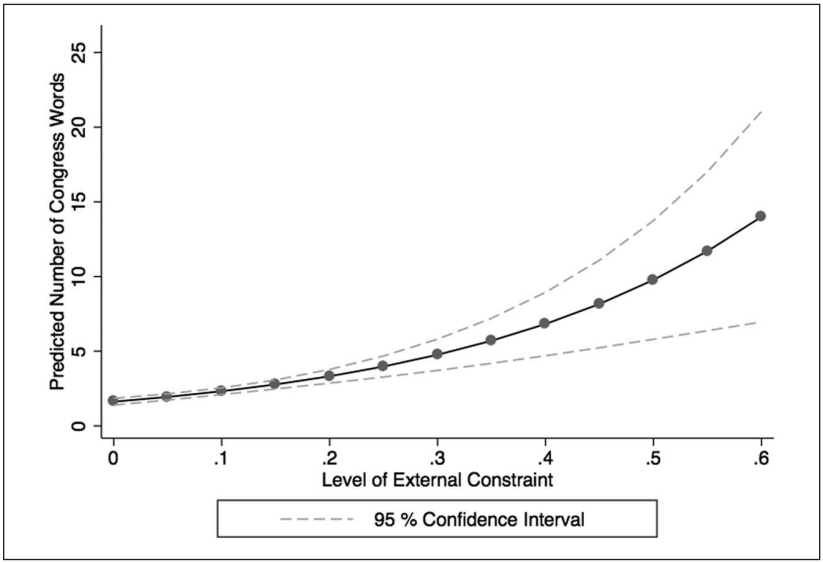

Figure 2. References to Congress by level of external constraint

Second, the data provide some support for the conditional constraint-Congress hypothesis. Figure 3 displays the predicted number of references to Congress by level of dissatisfaction with Congress at two levels of constraint (no constraint and high constraint). When the Court is constrained and dissatisfaction with Congress is at its lowest (meaning support for Congress is high), the predicted number of references to Congress is significantly greater than when the Court is unconstrained (about eight references vs. one reference). However, this difference decreases as the level of dissatisfaction with Congress increases. This suggests that the effect of external constraint on the Court is greatest when Congress is institutionally strong due to its high public support. In this scenario, the Court may be more likely to inquire about Congress during oral arguments since Congress is more apt to challenge the Court and is potentially more successful in such attempts.

We are cautious, however, in interpreting this result as the difference between high and low levels of dissatisfaction (with constraint held constant) only becomes statistically significant when external constraint is at least 0.35, which occurs in only a small minority of years during which the Court is constrained.[27] When constraint is at its median level among years where the Court is constrained, the difference between low and high dissatisfaction is not statistically significant.[28] Thus, these results offer modest support for

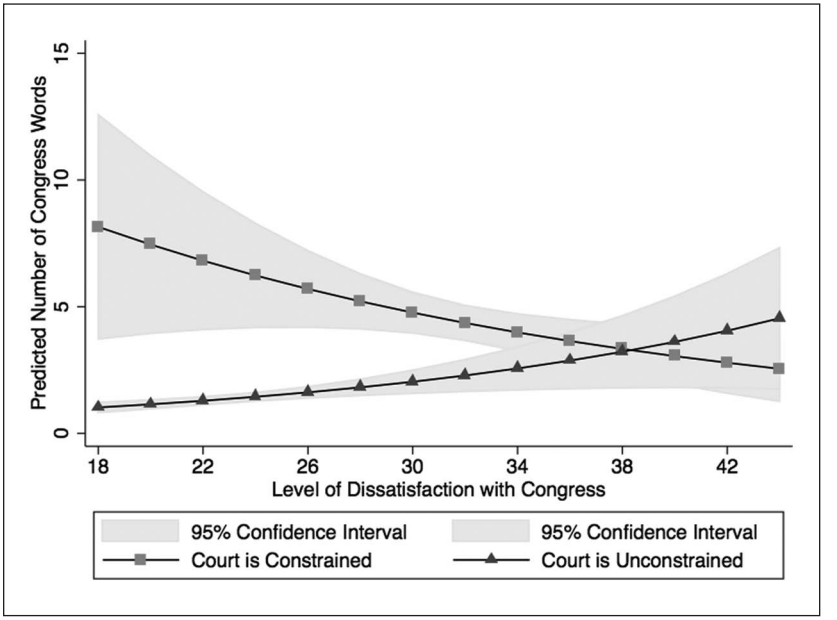

Figure 3. References to Congress by level of dissatisfaction with Congress when external constraint equals zero, meaning the court is unconstrained, and when constraint is set to the 80th percentile among years for which external constraint is greater than zero

the idea that the institutional status of Congress may influence the Court's calculations regarding its institutional maintenance.

Taken together, the findings reinforce the idea that the Court's attentiveness to Congress and its preferences is rooted in the justices' desire to maintain the Court's institutional legitimacy (Segal et al., 2011). When the justices receive signals that the Court's institutional good standing is decreasing or threatened, Clark (2009) demonstrates that they respond by decreasing the number of congressional laws they strike down as unconstitutional. We build on this finding by providing evidence of an additional response on the part of the justices. We find that when the Court's legitimacy is threatened by its extreme ideological position relative to the elected branches, justices respond by devoting more time during oral arguments to discussing issues related to Congress, such as congressional preferences. Additionally, our results suggest that in situations where the Court is highly constrained, the level of public support for Congress may condition this effect. The results reveal that the

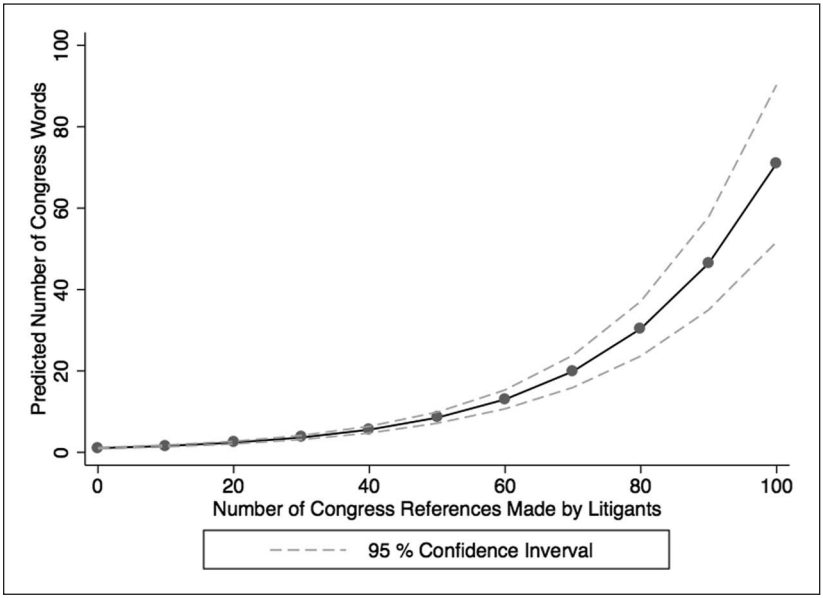

Figure 4. Justices' Congress References by litigants' Congress references

Court is attuned to signals about its legitimacy and takes action to gather more information when necessary.

At the same time, several other factors affect whether justices ask questions about Congress during oral arguments. When prompted by litigants to do so, justices use many more of these words (see Figure 4). Substantively, if litigants never utter a single word about Congress, justices raise questions about Congress just over one time per case. However, if litigants use 1 standard deviation more words than the mean, justices' rate of asking about Congress increases to more than six per case. Furthermore, the model also reveals a statistically significant positive relationship between *amicus* participation and references to Congress.

Finally, we note a lack of support for the other hypotheses concerning the number of Court-curbing attempts and public support for the Court. Rather, the analysis yielded an unexpected finding that the Court references Congress slightly more, approximately 2.0 times per case, in situations when the Court is unconstrained and public support for the Court is low versus 1.4 references per case when public support for the Court is high, though this difference is not statistically significant when the Court is constrained. Additionally, while the

model indicates statistically that cases with the federal government as a party influence whether justices raise Congress issues, the effect (an increase from 1.6 to 1.8 references per case) is not substantively significant given its magnitude.

Discussion

Recent separation of powers literature offers the institutional maintenance model as an explanation for why Supreme Court justices should be cognizant of how Congress may react to their decisions (Clark, 2009; Segal et al., 2011). What the literature does not answer, however, is how justices gather information about Congress in order to protect the Court's institutional legitimacy. Here we provide an answer to this important question. Indeed, Supreme Court oral arguments give justices the chance they may need to actively gather such information. Specifically, because it is customary for justices to interrupt attorneys' arguments to ask questions, they possess the ability to guide the discussion toward issues they find important for a case. Past work demonstrates justices take advantage of this opportunity by inquiring about the preferences of external actors generally (Johnson, 2004).

Our analysis and findings go beyond this general result by demonstrating justices vary the extent to which they direct the limited time for oral arguments toward Congress based on institutional maintenance considerations. In particular, justices raise questions about Congress more often as the level of external constraint increases, and there is some evidence these references increase further when the Court is constrained at the same time as public support for Congress is high. Thus, questions about the legislature occur systematically in response to cues about the Court's relationship with the external political landscape. This reinforces Clark's (2009) and Segal et al.'s (2011) argument that justices' concern for the Court's legitimacy is key to understanding their response, or lack thereof, to the separation of powers context. In other words, our addition to the separation of powers literature is an important one because it shows a mechanism through which the justices gauge the Court's relationship with the coordinate branches. This is critical because the institutional maintenance model, for which we find support, would not be possible without information. Thus, our results provide a significant advance in our understanding of the Court's place in the system of separated powers.

In addition, while we do not fully test the extent to which the justices utilize such information in their final opinions, it is clear the justices seek information so that they can steer clear of making decisions that might lead

Congress to retaliate. It is a simple, yet intuitive, argument that conforms to existing findings. Indeed, Johnson (2004) finds that almost 70% of all majority opinion references to the coordinate branches emanate from the oral arguments.[29] The point is that discussions about these branches clearly affect how the Court crafts its opinions. While it is beyond the scope of this article to test this hypothesis more fully, the next question is to determine exactly how this relationship works. Furthermore, we focus on the Court's propensity as a whole to raise questions about Congress during oral arguments, but it is possible that the level of attentiveness to institutional maintenance concerns varies across individual justices. As such, future work may benefit from examining this possibility. For now, this analysis provides an important step toward furthering our understanding of how justices use oral arguments to gather information required to protect the Court's institutional legitimacy.

Overall, while the full ramifications are yet to be seen, the recent interinstitutional tensions over *Citizens United* exemplify the potential dangers the Supreme Court faces from the coordinate branches of government when making decisions. Our evidence suggests justices take seriously these potential dangers, and thus the separation of powers context, by seeking and discussing information about these issues during oral arguments when they believe it will help protect the legitimacy of the nation's Court of last resort. By preserving the Court's legitimacy, justices safeguard its ability to establish lasting legal policy.

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Notes

1. 130 S. Ct. 876 (2010). The issue in this case addressed whether a federal law restricting distribution of *Hillary: The Movie* during the 2008 campaign for the Democratic presidential nomination inappropriately curtailed free speech rights.
2. While this may not be the quickest interruption in the history of oral arguments at the Court, it is near the top of the list on this metric.
3. 550 U.S. 511 (2007). This case dealt with whether the Speech and Debate clause protects members of Congress.
4. 531 U.S. 12 (2000). Here, the Court considered whether video poker licenses should be considered property for the purposes of the federal mail fraud statute.
5. This inquiry is of particular importance because it asks of both past and current congressional intent and preferences.
6. Of course the justices should also be concerned with the president because the executive branch enforces their decisions. Here, however, we are concerned with the branch that would initiate action intended to influence the Court's decision making generally (Segal et al., 2011). This is consistent with much of the work on separation of powers that focuses on congressional responses rather than on shirking by the president.
7. We note that not all scholars agree that the separation of powers context influences how justices make decisions. For example, the attitudinal model outlined by Segal and Spaeth (2002) argues that justices vote on the merits based strictly on their ideological predispositions without regard for institutional constraints. Additionally, Segal (1997) contends justices' behavior is relatively unconstrained by Congress and the president, In short, the attitudinal model provides competing expectations, predicting that the external political landscape should have little to no effect on justices' behavior. However, the preponderance of evidence demonstrates a separation of powers effect does exist.
8. In some ways, the threat of a decision being ignored aligns with the concern regarding a congressional override since it would be tied to a specific policy decision by the Court. We believe when Congress passes new legislation to override the Court, it responds to the Court with a corrective policy measure through official legislative means. Alternatively, when Congress ignores a Court decision, the Court's efficacy and legitimacy is called into question since Congress side-steps the Court through unofficial channels and signals policy disagreement *or* directly defies of the Court's authority. This latter component distinguishes it from the rational anticipation mechanism.
9. 462 U.S. 919 (1983).
10. These vetoes can and do continue to play a key role in the legislative process. The reason, as Pierce (2010) argues, is that it would not be possible to run the government

according to the strictures of separation of powers delineated at times by the Court. The Congressional Research Service also makes it clear that legislative vetoes are "alive and well" (see http://www.constitutionproject.org/pdf/4116.pdf).

11. In contrast, Farganis (2009) argues that while evidence suggests Supreme Court justices are motivated, at least in part, by concerns about negative responses from external actors (e.g., Clark, 2009), the threat of retaliation is minimal. More specifically, he examines Court-curbing attempts by Congress in the modern era and contends that, while there have been many attempts to hurt the Court, few have been successful. This makes the specter of retaliation by the coordinate branches much less credible. Like Clark (2009), however, Farganis (2009) agrees that justices may be similar to reelection-minded members of Congress (Mayhew, 1974). That is, if they believe the threat of Court-curbing actions is greater than reality may suggest, they will still act in a way to protect the institution from retaliation
12. Johnson (2004) also suggests much of the information in briefs and other outside sources is also biased. That is, it presents arguments in ways that advantage a group, a litigant, or other outside interest. In our case, this argument is important because biased information may keep the justices from knowing clearly where Congress or the president stands on an issue before them.
13. In addition, because justices usually do not talk to one another about cases prior to oral arguments (Liptak, 2010), they are unlikely to discuss the views of the other branches. This is akin to former Chief Justice Rehnquist's (2001) insight that justices know their colleagues' general preferences about an issue but not usually how others view a specific case.
14. Since Clark (2009) finds that the decrease in the number of laws held unconstitutional as a result of increased Court-curbing attempts is weakened as the ideological distance between the Court and Congress increases, it is possible the number of references to the Court may work in the opposite direction. We choose to focus, however, on the preponderance of evidence in the literature.
15. There is reason to believe Court-curbing attempts may free the Court to allocate time during oral arguments toward other ends since justices are already aware of the tension between their decisions and congressional preferences, as well as of the potential consequences of this discrepancy. Furthermore, the Court's attention to "institutional signals such as Court-curbing can help solve an informational problem confronting a Court concerned about its standing with the public" (Clark, 2009, p. 972). However, we believe that, while providing key information about institutional standing, an increase in Court-curbing attempts ultimately heightens the Court's need for information to safeguard its institutional legitimacy.
16. Reliable transcription is not available prior to 1979. The Oyez Project (www.oyez.org) is currently creating transcripts from audio recordings of the oral argument

sessions, which are available back through 1955. We are also limited because several of the measures we draw from Clark's work are only coded through 2003.

17. We exclude the small number of reargued cases that occurred during the time period under study. In reargued cases, the total time for oral arguments is significantly expanded, which would allow for more references to Congress by sheer opportunity rather than for the types of substantive reasons we are interested in testing here. Additionally, the ideological distances may change from the first argument to the second, and since these cases make up a very small proportion of the sample, we exclude them from our analysis.
18. This approach assumes, of course, that the occurrence of these words is linked to a justice raising a concern about the coordinate branch. We believe the words in our list are specific enough that the nongovernmental contexts in which the word could occur are few and far between. What is more, absent any unresolved "noise" being systematically correlated with our theoretical expectations, its existence will not harm either our results or the inferences we make from these results. That said, we coded by hand a 5% random sample of our observations. What we found is telling—the Court raises most of its concerns about the enacting Congress or about the current Congress (results available upon request). This strongly supports our assertion that the justices are concerned with how the legislature may respond to its decisions or that they interpret properly laws Congress passed. However, the word count method used in this analysis is only one step toward understanding the conditions under which the Court engages in this behavior. Future work should consider a more nuanced approach.
19. We do not necessarily distinguish between the enacting Congress and the current Congress. Certainly, it is the current Congress with which the justices should be most concerned (given that it is the current make-up of Congress that would initiate an attack on the Court's legitimacy), but they often also need information about the intent of a law as well as about what future actions Congress may take. As such, we are not concerned (nor do we think we should be) with this distinction since they both involve the justices' attempts to better understand the Court's general relationship with Congress. Testing these concepts in a combined fashion is akin to Segal et al. (2011) simultaneously testing the rational anticipation model and the institutional maintenance model.
20. An argument could also be made that we should use a zero inflated model. However, there is no justification for arguing that any of the zeros in the model are there permanently (Greene, 2002; Long, 1997). Given that at least one justice (and usually at least eight) speaks during every oral argument session, there is always a propensity for Congress issues to be raised by the Court. As such, while there is an overdispersion of zeros, there is little reason to believe the sample (at the case level) is truncated between zeros that are part of the count data and those that remain zeros permanently.

21. These scores update and extend the original ideal points developed by Bailey (2007).
22. The intuition for using previous year is that the justices will know such bills were introduced in the recent past but may not know that such bills are currently in the hopper. That said, it is worth noting that we do not take the same tack with the ideological variables. We make this choice because the scholarship cited in the theory section suggests justices are attentive to the ideological predilections of the current Congress and president.
23. Gibson, Caldeira, and Spence (2003) describe this question as capturing "general satisfaction with the contemporary performance of the institution" (p. 361). Thus, we use this measure of public support as an indicator of the Court's institutional legitimacy, recognizing that it does not fully capture institutional legitimacy, since alternative measures are not available regularly for the period under examination. For a full discussion of the coding, see Clark (2009).
24. We are agnostic at this point on whether this variable taps case salience or case complexity, However, Collins (2008a, 2008b) makes it clear that this variable most likely taps complexity.
25. Since the median value of constraint is 0, meaning the Court is unconstrained, we use the median level of constraint among years where the Court is more ideologically extreme than Congress and the president to capture a substantively meaningful level of constraint the Court has faced for these examples of predicted values.
26. We calculate all predicted values (to determine the substantive effect of the variable) using the SPost commands. This allows us to plot predicted values at different levels of our variable of interest (Long & Freese, 2006). All variables are held at their median or modal values unless otherwise indicated. All differences described are statistically significant at the 95% level, two-tailed test, unless otherwise specified.
27. This is the 80th percentile.
28. Additionally, we note that when the Court is unconstrained or constraint is minimal, the difference is statistically significant in the opposite direction.
29. This is to say, the discussion of an external actor originated during the oral arguments and not in a litigant or amicus brief.

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