The Threat of Non-Implementation and the Behavior of the Supreme Court: Empirical and Normative Assessments of Voting Behavior and Majority Opinion Construction

by

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(Under the Direction of Susan Haire)

ABSTRACT

A growing literature on the separation of powers focuses on the Supreme Court's anticipation of implementation problems in a subset of cases called lateral, those that require executive action to take effect. This topic still lacks a justice-centered analysis, use of ideological distance as an explanatory variable, and focus on the discretion that the justices have to vote their sincere preferences, in addition to merits outcomes. The construction of majority opinions has been the subject of scientific inquiry, but not yet in situations in which the Court fears that its cases may not be implemented faithfully. Finally, the subject of judicial behavior in lateral cases lacks a full theoretical structure explaining the relationship between the Court and the President. This project supplements the literature on this important topic by developing and testing competing theories of judicial behavior in lateral cases.

INDEX WORDS: U.S. Supreme Court, U.S. President, separation of powers, judicial behavior, judicial voting, executive implementation, LIWC, Bayesian estimation, democracy, democratic theory, power.

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by

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A Dissertation Submitted to the Graduate Faculty of the University of Georgia in Partial Fulfillment of the Requirements for the Degree

DOCTOR OF PHILOSOPHY

ATHENS, GEORGIA

2018

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December 2018

DEDICATION

I dedicate this project to my family: to my mother, my brother and sister, my nephew Warren, my brother-in-law Chad, and especially to my late father, who passed away in December of 2015.

I also dedicate this work to my extended family, both Hales and Ballingruds: my aunts and uncles, my cousins and their children, my half-brothers, my late grandparents, my surrogate grandmother Thelma Morris, who turned 103 this year, and her late husband Samuel Morris, after whom my brother is named.

And finally, I dedicate this project to my close inner circle of friends, who have provided much emotional and mental support.

I dedicate this project and its completion to all of the people who have supported me so generously, and without whom I could not have achieved this milestone. I owe what I have done, and who I am, to all of the aforementioned.

ACKNOWLEDGEMENTS

I am deeply indebted to the assistance of my committee members, Richard Vining, Christina Boyd, and Alexander Kaufman (in no particular order), and especially my major professor, Susan Haire. I would also like to thank Keith Dougherty and Sean Ingham for helpful comments and support on the many earlier versions of this project and its component pieces.

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INTRODUCTION

The relationship between the Supreme Court and Executive branch is subtle and complex—for reasons that include the necessary overlap between the executive and judicial powers. The power to execute implies a power to interpret. Just as a judge must work up a conception of the law and the legal tradition in which he operates to issue a correct ruling in a given case (cf. Dworkin 1988), a President must do the same in order to develop an efficient and morally attractive policy agenda around the law with which she is charged with executing. This means that the courts share with the executive branch a concurrent power "to say what the law is."[1] Implementation requires that one develop a working conception of the law and its meaning for two reasons: 1) Inevitably there will be times when the interpretive methods proffered by other branches will be a) incomplete, b) absent entirely, or c) even manifestly incorrect. In these times, the President and her deputies must supply their own interpretations. 2) The other branches' power to impose this deference onto the executive branch is limited. The implementation of the Court's decisions is largely out of their hands. Even should the Court be unambiguous in exerting its will over the implementation of the law, the federal authorities that translate law into policy are subject to the President.

That the executive and judicial powers inevitably overlap is an idea with roots in the theory of the separation of powers. Montesquieu, whom the Constitution's framers

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[1] *Marbury v. Madison*, 5 U.S. 1 Cranch 137, at 177 (1803).
[2] See also Federalist No. 78 for Hamilton's take on this issue: "[The judiciary] may truly be said to have neither FORCE nor WILL but merely judgment, and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."
[3] Notably, Justice Kennedy's concurring opinion emphasized that any subsequent proceedings must give wide latitude to the executive branch, as required by the majority opinion as well, and urges government

took to be the singular authority on this theory, described the judicial power as a part of the executive: "The judges …are shoots from the executive stock." Montesquieu divided executive power into foreign and domestic realms, and named the judicial power as a segment of the latter. Although the American separation of powers exalts the judicial power as a coequal branch of the government, the overlap remains.[2]

As an example, and to highlight the importance of this issue, let us take the pending legal battle over the travel bans that the sitting President has attempted to enact. The legal drama started with federal judges across the country (NY and MA on January 28 and 29, respectively) blocking enforcement of the order on constitutional and statutory grounds starting only two days after the order was issued.

Arguments were presented on February 7, 2017 before the Ninth Circuit Court of Appeals, and on February 9, the Ninth Circuit upheld the district courts' nationwide block on the ban. The President, on February 16, with his frustration surely growing, promised to re-issue the ban to pass muster with the Ninth Circuit's ruling. On March 6, in an effort to meet the courts' requirements, the President issued a new travel ban—this second executive order, with the first one still on the public agenda, caused massive confusion at airport across the country. Nine days later, a federal district judge in Hawaii blocked the enforcement of the ban again. The next day, a federal judge in Maryland ruled the same. The second ban, as opined by the federal court in Hawaii, was merely the descendant of the first ban, and retained all or many of the same statutory and constitutional problems as the first. The court ruled that the orders were motivated by

[2] See also Federalist No. 78 for Hamilton's take on this issue: "[The judiciary] may truly be said to have neither FORCE nor WILL but merely judgment, and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

"animus and a desire to discriminate on the basis of religion and/or national origin, nationality, or alienage."

This second iteration of the travel ban went to the Fourth Circuit, which voted 10-3 on May 25 to block the travel restrictions on the six Muslim-majority countries identified in the executive order, but reinstated the 120-day refugee ban. The Fourth Circuit largely confirmed the sentiments of the district courts, claiming that the order "drips with religious intolerance, animus, and discrimination", and reflects the President's "desire to exclude Muslims from the United States."

The Supreme Court, as of this writing, has not ruled on the constitutionality of the travel ban. On June 26, the Court agreed to take up the case in October, and in the interim, overruled the lower courts by ruling unanimously to allow the travel ban to go into limited effect. The administration could exclude from entry all people from the six countries specified by the ban but those with a "bona fide" relationship to a person or entity in the United States. The definition of "bona fide" came quickly under scrutiny: the administration interpreted this standard as excluding grandparents and grandchildren. But the Supreme Court, on July 19, sided with the Hawaii district court, which ruled that extended family like grandparents and grandchildren, aunts, uncles, and cousins indeed had bona fide relationships within the United States that allow them to circumvent the travel ban.

The second travel ban expired on September 24; the Court therefore dismissed the pending case as moot. On that day, the administration issued a new order banning travel indefinitely to the United States from Iran, Somalia, Syria, Libya, and three new countries: Chad, North Korea, and Venezuela. This new ban set information-sharing

capabilities as the standard for free travel—an attempt to provide a workable standard different from the President's public statements vilifying Muslims. New State Department standards required that foreign countries must meet, or plan to meet, certain heightened information-sharing standards or face travel restrictions. The government also reserved the right to grant individual waivers on a case-by-case basis—both measures probably intended to make litigation more difficult and justification easier for future court challenges.

On October 17, it became clear that these efforts had not worked. A district court judge in Hawaii issued a new order temporarily preventing implementation of the travel ban. The court attributed this order to the third ban still "plainly discriminat[ing] based on nationality in the manner that the Ninth Circuit" previously found unconstitutional. The court also noted that the same "maladies" had been carried forward from the first two failed bans. However, the plaintiffs in Hawaii did not challenge the travel bans from North Korea or Venezuela; only the five Muslim-majority countries named in all three bans would see their diplomatic posts permitted to issue visas, as before. A district court in Maryland ruled substantively similarly to the district court in Hawaii on the same day.

After repeated frustrations, the President attacked the courts for interfering with his policy. Perhaps laying the groundwork for defying the courts in the future, Trump laid blame at the feet of the courts, calling the rulings "unprecedented judicial overreach"; the judicial response as "slow and political", and finally, that any American deaths from terrorism after preventing the ban from functioning would have been caused by meddlesome, politically motivated courts.

It is easy to see that the latter comment, especially, could be intended both to delegitimize the courts, and to prepare for open defiance against them. Faithful implementation of the suspensions of the travel bans has already arisen as a problem, with law enforcement at airports either unwilling to submit to the courts' authority, or has stemmed from genuine confusion as to the bans' requirements and their legality. The President, by attacking the courts' legitimacy, is possibly preparing a justification for open defiance over the implementation of his travel policies. What better justification for lawlessness than to save lives?

The Supreme Court weighed in on this matter in the case of *Trump v. Hawaii* (585 U.S. 1, 2018). Here the Court ruled that the President's travel ban was congruent with his statutory authority under Section 1182(f) of the Immigration and Nationality Act, which provides the President "broad discretion" to suspend the entry of non-citizens into the United States. The Court also held that the travel ban was not in violation of another statute, Section 1152(a)(1)(A) which bans discrimination by nationality in the issuance of visas. This statute, the Court found, does not block the President from banning certain nationals of some countries from entering the United States. The Court noted that previous Presidents have done much the same in earlier years.

The Court then addressed the Establishment Clause claim: that the travel ban violates the Constitution because it is a covert attempt to block Muslims from entering the country. On its face, the Court held, the order does not burden or favor any religion, but even behind its facial meaning, the Court found that the ban was not founded on anti-Muslim animus because many majority-Muslim nations were not subject to its restrictions, and some non-majority-Muslim nations were so subject. The incongruence

between the nations targeted and the nations that are majority-Muslim caused the Court to defer to the executive branch's judgment that there was a sufficient national security interest to justify this ban.[3]

One issue weighing on the courts' minds through this litigation process must be the executive branch's responses to the decisions that the courts hand down. The President had repeatedly threatened reprisals against the Ninth Circuit through institutional means (like breaking the Ninth Circuit into two new circuits) and assigning responsibility to the courts for lives lost in terrorist attacks, should they stand in the way of the President's wishes. The message was clear: fall into line, or there will be consequences. And beyond the political (and extra-political) reprisals, the courts must consider how the executive branch will behave in response to decisions that stand in the way of its preferred policies. Should the President command his subordinates to implement his ban in spite of judicial decisions to the contrary, by what means may the courts stop him? As Stephenson (2011) put it, "Why would people armed with…guns ever submit to people armed only with gavels?"

The challenge that cases like these present for the courts is clear: how can a judicial officer ensure that a change in policy is made within a department over which he or she has no direct control? Stories from airports of men and women still detained by law enforcement even after the injunctions against the travel bans from federal court frequented the news wires. It is clear that even at this fairly early stage, the courts have

[3] Notably, Justice Kennedy's concurring opinion emphasized that any subsequent proceedings must give wide latitude to the executive branch, as required by the majority opinion as well, and urges government officials to comply with the Constitution even when their actions are not subject to judicial review. This seems to be, on the one hand, a tacit admission that the Court is unwilling to challenge the executive's power on issues like these, and an exhortation to uphold the Constitution when the Court is unable, or unwilling, to compel compliance.

received questionable compliance from the executive branch with their directives. In such cases as these, where the courts require changes in policy from actors outside of the judicial branch (usually by the executive branch), securing compliance is an ever-present problem. The multiple travel bans issued from the White House in the last year present the tools that the executive branch might use to defy the courts: shifting the goalposts, overloading the courts with more challenged policies than they can manage, and in some cases, continuing to enforce the policies without court approval.

But, of course, this danger does not obtain in all cases: in many, the courts are able to dispose of a case without much involvement from the executive branch. Most cases that the Court hears require little in the way of executive involvement: either the executive branch is not involved at all, or it is involved in ways entirely predictable and within the complete control of the courts. An example would be criminal procedure cases. Though the executive branch is involved inasmuch as it has control over suspected criminals, the courts do not require anything more than adhering to a simple schedule. That is, the courts do not require changes in executive policy, or for executive actors to implement a broad policy scheme that the courts are setting forth. The former category, in which the executive is not involved or minimally involved, is called vertical cases; the latter, in which the executive branch is required to make changes in their own policies or to implement policy schemes broadly devised by the courts, are called lateral cases (Hall 2014). Lateral cases will be the focus of this study.

This study will focus on an aspect of the separation of powers that has received less attention than other dimensions of the American system. The first chapter elaborates a theory of the Court's responses to the President's power to control the implementation

of its cases. The central idea is that in certain cases, the Court must be aware of how the President and executive branch will be implement those cases, and will alter their decision-making ex ante to reduce the probability of disobedience. This study finds that the Court is more likely to rule in favor of the federal government in lateral cases, as the President grows more ideologically distant from the Court median. Then this study investigates the mitigating and exacerbating factors in this relationship, finding that executive orders sharpen the effect of this concern on Court behavior, and that the effect is conditional on how long the President has been in office, and whether the President is in the last year of the second term.

The second chapter extends beyond votes on the merits to how the Supreme Court constructs its majority opinions. Previous research suggests that the Supreme Court behaves differently when the justices have reason to fear that their policies will not be implemented, or implemented unfaithfully, by executive actors. Another body of research suggests that the Court uses clear language to enhance the chances for compliance when dealing with other government agents, whereas other work suggests that the Court obfuscates its opinion language to protect itself from the political consequences of noncompliance. I propose to find evidence for these competing theories by using the LIWC content-analysis software of Supreme Court majority opinions in lateral cases. The evidence I find is mixed between the two theories, but tends to support the clarity model. I also find evidence that the Court's opinions reflect awareness of its weakened position in lateral cases, when ideological distance between the Court and President, which favors nonimplementation, is high.

The third chapter assesses the normative implications of the findings of the first two. The Court's independence from political influence comes heavily into question given these results, and the third chapter explores the implications of this for the rule of law and constitutional democracy. I assess existing arguments on the need for political influence over the Court, and counter them with a conception of democracy centered on the distribution of power to resolve questions of common concern. Situated in this framework, the results of the first two chapters become troubling. It is easy to conceive the Court as deciding identical cases different owing only to the outcome of the previous Presidential election, which presents grave questions about consistency in the rule of law.

CHAPTER 1

1. The Inevitability and Importance of Implementation Problems

Many cases that the Supreme Court hears require little in the way of direct executive involvement. But in cases where the executive branch *implements policies* created by the courts, signals of defiance should concern the Court.

In the first section of this chapter, I develop a theory of Court behavior under conditions that would favor executive non-implementation. Next, I subject the theory to a battery of empirical tests. In the third and fourth sections, I develop and test a theory of conditional effects: the political factors that exacerbate or mitigate the concern of the Court in cases where the executive branch is responsible for implementation. Finally, I further elaborate the theory of non-implementation in light of these results.

2. Constrained Decision-Making in American Democracy

Dahl (1957) noted that the federal courts are one piece of the federal lawmaking machine, and that the other branches of government have numerous devices to keep the Supreme Court in line with the preferences of a majority of the country: these include replacing justices, jurisdiction-stripping, control over salaries, statutory override, and constitutional amendment. Because of these, the courts are unlikely to oppose the preferences of those in other parts of the federal lawmaking process. Dahl notes how infrequently the Court has played its vaunted role as the protector of minority interests against a hostile majority. When the Court invalidated federal legislation, which upon Dahl's writing had been rare, it seldom challenged the same coalition that had created the law it struck down. Second, and as a result, the courts risk being marginalized in the

lawmaking process by acting against the preferences of the other branches through non-acquiescence or defiance by the other branches.

Stephenson (2011) asks the question quite pointedly: "…the judiciary is created, funded and supported by the government, and courts rely on the executive to enforce judicial rulings. Why, then, would the government accept the limits imposed by a truly independent court? Why would people with money and guns ever submit to people armed only with gavels?" (60) The answer that Stephenson (2011) offers is that an independent judiciary is a tool that political agents use to ensure the protection of their accomplishments and interests when they are no longer in power. The independent judiciary is a tool to enforce mutual restraint, even when one party is in control of the government. A competitive political environment produces risk-aversion in those who wield power, and courts who one day impose limits will the next provide protection. Nonetheless, when the political environment is less competitive, this study finds that courts risk marginalization—that is, during unified government.

Kritzer and Silbey (2003) develop the concept of the "government gorilla": the government writes rules that help them win in court. Echoing Dahl (1957), this study notes that despite norms of judicial independence, courts are not truly independent of government; they are part of it. Courts are agencies of the state, (Shapiro 1964, 1968) and judges may feel some loyalty to the regime that they represent (see Derthick 2002, 83, 218). This does not mean blind obedience, but may be a decisive factor in a close case (Rosenberg 1991, 14-15). The courts have been complicit in this process of constructing rules of law that favor executive authority. The Supreme Court has promulgated a variety of so-called deference doctrines, the most prominent of which is

the *Chevron* doctrine, which requires courts to defer to any "reasonable" interpretation of a statute by an executive authority. This and other such doctrines require the courts to treat the executive branch more favorably than other litigants who come before them. "In practice, this means that when an ambiguous statute is open to a range of interpretations, the executive branch is permitted to choose the interpretation that is legally binding," (Posner and Epstein 2017, 7) and courts tend to uphold those choices.

Courts must be sensitive to how their decisions are received, lest they be attacked or ignored by other institutions. But, courts may not be equally sensitive to the effect of other institutions' preferences across all cases. In certain cases, courts must rely on the powers of other branches to develop and implement policy. When this is so, there is a limit to what the courts may ask before other branches' will to comply runs out. If it does, the other branches will minimize the influence that the courts exercise over policy, and they grow weaker as a result. If the President's views diverge from the Court's, then the Court has reason to worry about non-implementation. It is not only the type of case, but the President's preferences that drive the Court's fears. The type of case opens the Court up to the influence of divergence from the President's preferences. I highlight the idea presented by Dahl (1957): that the Court is part of a majoritarian governing coalition, and that it can either join the coalition, or attempt to stand in its way, and risk retaliation.

If the Court anticipates this, one would expect to see different decision-making with respect to the kinds of cases that the Court decides. Compared to cases in which the justices do not rely on the executive branch to help them make policy, decision-making may be different: more deferential to the lawmaking majority that Dahl discusses—

particularly the President. The key difference is in case context. The fear of non-implementation triggers some fears for the Court: knowing it is only one part of this majority lawmaking coalition and that it risks defiance if it runs afoul of the other members. Where the courts ask the other branches (usually the executive branch) to construct policy to implement judicial decisions, the fear of non-implementation is likely to prompt a more deferential pattern of decision-making than in cases where no such fear is present.

The cases that require executive policy for implementation are called lateral (Hall 2011; 2014) because those cases require participation from another branch of government—a lateral move, as compared to the vertical relationship between the Supreme Court and lower federal and state courts. In lateral cases, to have broad policy implemented, or to stop the implementation of a broad policy, the Court requires the cooperation of the administration.

But it is not merely the prospect of executive implementation that worries the Court. If the policy views of the President and the Court are similar, there is little reason for apprehension. The President will happily implement Court decisions if she agrees with its merits. The Court can behave sincerely and be fairly secure in the knowledge that the President will help them out—but only if the Court and President are ideologically congruent.

3. Court Deference to the President Varies by Case Types

The Court's responses to other institutions of government vary between different kinds of cases. Studies focusing on the relationship between Congress and the Court in statutory cases include Segal (1997), Meernik and Ignagni (1997), and Hansford and

Damore (2000). Studies on constitutional cases include Spiller and Gely (1992), which models formally the relationship between Congress and the Court under statutory and constitutional cases separately, and Segal, Westerland, and Lindquist 2011) which finds that the Court is responsive to institutional constraint even in constitutional cases, when they have reason to fear that their institutional integrity is at stake.

Other studies focus on the external influences on the Court in granting cert (Harvey and Friedman 2009; Owens 2010), or in striking down federal laws (Clark 2009). Howard and Segal (2004) find that "the justices react differently to requests to strike federal law than they do to requests to strike state law." Segal (1997; 1998) only examines the Court's reaction to Congress in statutory cases to capture the influence of Congress' ability to override the Court's judgment, which is vastly more difficult in constitutional cases.

So, previous research establishes that case types matter. Yates and Whitford (1998) echo this thesis by importing the "Two Presidencies" theory into Court behavior. This study finds that the Court's behavior regarding the federal government as a litigant is conditional on the kind of case: the Court rules in the government's favor more often when the case involves military or foreign-affairs issues. There is, in a sense, a dual presidency in the Court: the government's success rate varies with each given case's issue areas. This sets up the idea that the kind of case matters when the Court is dealing with the executive branch.

This study foreshadows the concept of the lateral case, which will be discussed in the next section. Yates and Whitford (1998) find that the Court is more deferential in foreign policy and military cases. This suggests that if other issue areas have salient

features in common with military or foreign policy cases, then we should observe similar effects. Like in military or foreign policy cases, in some domestic spheres the Court must rely on the policymaking power of the Executive Branch to make its designs become real. If these cases have in common a dependence on the compliance of the President, then we should observe similar deferential behavior.

4. Implementation of Court Decisions

Several previous studies have established that the executive branch wields some authority over the courts, and can affect their decision-making. For example, Hebe (1972) and Corwin (1957, 227-62), note that "…presidential action taken pursuant to his power as Commander-in-Chief is virtually beyond the ambit of judicial power." (Hebe 1972, 697). Yates and Whitford (1998) find evidence to support the "two presidencies" thesis: the idea that the President has the power to command in the areas of military and foreign affairs, but only the Neustadtian (1990) power to persuade in domestic affairs.

The reason that studies like Yates and Whitford (1998) find that the Court responds to the Presidency differently in certain kinds of cases has to do with the power that the President has to control the implementation of the case directly. In foreign affairs and military cases, where the President has vast constitutional power vested in him as the Commander-in-Chief and chief diplomat for the nation, the President's power to control policy is high. In other areas, where the President must be empowered by Congress or the courts, the presidency's power is diminished. The Court responds to the President's control over policy, giving the government its preferred outcome as the President's power over how the case is implemented grows.

The power of executive implementation over the Court is empirically explored in

some recent studies (Hall 2011; 2014) and developed theoretically in others (*Ibid.* Canon and Johnson 1999; Rosenberg 2008; Black and Owens 2012; Pacelle 2015). The central argument is that when the Court needs the President's compliance, and expects not to get it, the Court will be increasingly likely to side with the President so as to avoid internecine battles. "The reputation of the judiciary is imperiled when its rulings go unheeded. The institution's reputation and prestige derive from, as much as they contribute to, the willingness of other political actors to heed court rulings." (Howell 2003, 160) Preserving its integrity is the only way that the Court can maintain its public prestige and respect as a coequal branch of government.

In any single case, this may not be enough to tip the Court's decision-making. But failure to have its decisions taken seriously erodes the Court's standing over time. "The Court, of course, has no police officials of its own, and its independence is therefore of a limited kind. This might not be too significant in an individual case, but the Court's publication of worthless decisions has a cumulative effect. If one decree is ignored the Court loses some of its immense prestige, and each unenforced decision increases the possibility that the next will also go unheeded. Proportionately to the ineffectiveness of its rulings, the operational validity of the Court disappears, and it can eventually cease to exist as a body performing a valuable function." (Strum 1974, 3–4) But in those select cases when opposition is mobilized against the judiciary, and executive enforcement is uncertain, judges may temporarily relinquish their power to rule. Indeed, "it is an axiom of constitutional justice that any decision which the Court thinks will not be enforced will probably not be made." (*Ibid*.)

When the Court makes a decision, the President must decide how to implement it. The President may choose to implement faithfully, in line with the intentions and assumptions of the Court, or she may choose to stall, or implement in such a way as serves her own preferences, or use her power to try to undo what the Court requires.[4] The President may implement unfaithfully when she disagrees with the outcome, and believes that the benefits outweigh the costs. (Rodgers and Bullock 1972) The concern over non-implementation may cause the Court to behave differently than where the President has no such power. Non-implementation is more likely when the Court is ideologically distant from the President. In this study, the observation strategy is limited to cases in which the federal government is one of the litigants before the Court so that the President's implementation power is directly relevant to whether the majority opinion becomes real policy.

This suggests that when the Court needs the President's compliance, and expects not to get it, the Court will be increasingly likely to side with the President so as to avoid internecine battles. "…[T]heory argues that if justices do not follow the administration's wishes, the president will try to evade the Court's ruling or punish it. Thus, when justices face possible political sanction, they will moderate their behavior in line with majoritarian preferences. Although the theory is clear, there is only bare empirical reason to believe that such influence exists." (Black and Owens 2012, 46).

[4] Examples include Eisenhower's resistance to implementing *Brown*, or Nixon's half-hearted approach to desegregation after *Alexander v. Holmes County* and *Swann*. In those cases, Eisenhower simply avoided helping the courts to implement desegregation until his hand was truly forced in Little Rock. Nixon reluctantly helped to implement desegregation, but he did so by creating the state-action distinction ahead of *Milliken*, and after *Swann* he proposed a constitutional amendment to undo court-required busing plans. Although most desegregation cases do not involve the federal government as a litigant, many of them illustrate the point that presidents can evade the Court's preferences.

The crucial mechanism here is that the Court defers to the executive out of fear that its decisions will not be implemented, and thus its power and credibility undermined, unless it does defer (Knight and Epstein 1996; Maltzman 2007; Black and Owens 2012) Pacelle (2015) puts the point rather succinctly: "The motivating idea is that the Supreme Court will forecast how the President will react and shape its decisions accordingly." (40) The Court loses legitimacy with the President's refusal to implement. Howell (2003) adds to the point: "Court rulings retain authority by virtue of their legal enforceability. When enforcement is wanting, however, in a fundamental sense the ruling is compromised. And with the compromise of the ruling comes the compromise of the institution that delivered it."[5] (160) The Court depends on the idea that it is above politics, and does not sacrifice the Republic's ideals for the sake of compromise.

When the Court made its segregation-busing decisions, the administration went along but grudgingly, and Nixon urged Congress to create a constitutional amendment relieving the administration of the duty to enforce that policy. Nixon, though he agreed to help the Court implement desegregation, refused to do so any farther than absolutely necessary, and crafted an exception for himself rooted in the state-action doctrine. One notes these examples of grudging compliance: the President is hesitant to flout the Court openly because it is dealing with a legal order, not a negotiation over law. However, it was the Court, not the President, who eventually bent to the latter's will, adopting the de facto-de jure distinction that Nixon had ordered his subordinates to employ when striking at segregation in the South in *Milliken v. Bradley*. In so doing, the Court took the wind

[5] Howell adds: "When the potential source of resistance is the president himself (rather than an interest group, firm, or even some other branch of government at the state or federal level) the courts are most vulnerable. For here, the very person whose actions are under dispute has ultimate authority over the enforcement of the court's ruling." (2003, 162) Also see Cash (1965, 116) for a similar point.

out of the Nixon administration's sails in its efforts to pass a constitutional amendment through Congress to overturn *Swann*, and obtained a commitment from the executive branch to implement the promise of *Brown* at least partially.

However, as Howell (2003) also notes, Pyrrhic victory is the best outcome of constant conflict; neither side wants to be king of the ashes. The President has much to lose from defying the Court, and thus her power to defy the courts openly is limited. But, because the outcome of such a battle is costly to both, both branches have incentive to craft their positions and rulings so as to avoid conflict. This may explain why Nixon, despite his "southern strategy" and hostility to desegregation, was not willing to ignore *Brown* entirely.

It is true that the Court maintains, "though we may not compel the President to comply, it is not within the contemplation of the law that he would fail to comply." (*Virginia Coupon Cases*, 114 U.S. at 288 [1898]). The Court has good reason to assert this, whether it is true in practice or not. To admit openly that the political environment can change the outcome of a case—to allow that a case is decided by anything other than the legal merits of each party's argument—is to undercut the basis for their own institutional legitimacy. The Court depends on the idea that it is above politics, and does not sacrifice the Republic's ideals for the sake of compromise.

The classic study by Rosenberg (2008) posits a model of judicial decision-making, and the courts' role in the separation of powers, as either the active protector of liberties and political minorities, or the subordinate role of merely pointing out when other branches of government have failed to live up to legal or constitutional standards. The former model has the Court as a powerful driver of social change, consistent with the

most optimistic interpretations of the Warren Court and its ambitious project in *Brown*. The latter model has the Court not as the vanguard of progressivism, but as a referee of the disputes between other government agencies. One of the arguments in favor of the constrained-Court model, according to Rosenberg (2008, 10) is the courts' lack of implementation power. Both Rosenberg (2008) and Howell (2003) noted that the Court's aggressive push for desegregation in the South was hampered by fierce resistance at the state level, and indifference and (at best) grudging acquiescence at the federal level.

The institutional devices that Rosenberg (2008) claims militate in favor of the constrained-Court view include the compliance that the courts require from other agencies of government. "The judiciary lacks the necessary independence from the other branches of government to produce significant social reform." (15) As with any social change, the courts must have the ability to develop policy and the power to implement it. This requires tools that the courts lack. Judicial decisions are often not self-executing, and at times rely on the implementation and policy-making power wielded by other governmental actors over whom the Court has limited control. The courts are dependent on other elites, a weakness that was not lost on judges in the early days of the Republic: John Jay refused his place on the Court because the it was too weak to be a real political actor, and John Marshall was aware of the Court's weakness enough not to order the Jefferson administration to implement any policies in *Marbury*.

Courts are heavily dependent on popular support to ensure compliance from other elites. But the public is often uninformed about even major Supreme Court decisions, and may not support the Court if it faces resistance from other elites. Either elites must be willing to implement, or the public must make them willing to implement. This

problem is most acute with issues of major social reform (Rosenberg 2008, 16), and those issues tend to be contentious in the public; if elites do not want to change, then the public may be too divided to force them into it.

The judicial hierarchy also lacks the tools to develop effective policies. There is no specialization in either law or policy in the lower courts, and little expertise and little time for anything but deciding cases quickly and without major policy development (*Ibid*. at 16). The judicial hierarchy is not a bureaucracy built to conceptualize or carry out major policy change. The courts cannot effectively monitor changes or control those charged with carrying them out. Further, courts also are apolitical by norm, and cannot engage in the deal making or bargaining that helps to implement policy in real politics.

Judges may be unwilling to take on the task of ordering policy changes in other institutions, what Rosenberg calls an "essentially non-judicial task." (18) The slow-moving nature of legal process allows lots of time for counter-moves by people opposing social change; an example is in environmental regulation (*Ibid.*), where courts are used often to delay change rather than being an effective tool for pursuing it. But under the right conditions, courts can be effective vehicles for driving social change (Rosenberg 2008, 30-31), but these conditions are fairly stringent. Rosenberg (2008) provides these conditions; two are particularly relevant for this project's purposes.

The first condition: "Courts may effectively produce significant social reform when other actors offer positive incentives to induce compliance." (33) This would include the funding to schools that then implemented desegregation in the South. This condition suggests that courts need elites' support against people who would resist implementation of their opinions.

The second condition is that "[c]ourts may effectively produce significant social reform when other actors impose costs to induce compliance." (*Ibid*.) This is especially relevant when the courts seek compliance within the administration, and the creation of policies and plans needed to implement judicial decisions in the real world. These two conditions feed into the central argument regarding implementation: the Court needs help to ensure it, and without it, risk institutional damage as their attempts to make policy die on the vine. The two conditions, in other words, are that courts must have institutional allies who can either coerce or entice compliance with their decisions.

The "hollow hope" that Rosenberg (2008) describes was a function of the Court's inability to implement desegregation policies on their own, owing to their lack of control over executive agencies, and their failure to secure the active support of the federal government in this project. One useful example from Rosenberg (2008) is the comparison of southern black children attending school with white children between the '50s and '60s. After *Brown*, the proportion of percentage of black children going to school with whites changed little, or not at all (49-51), and remained stagnant until 1964, when the other branches of the federal government joined the desegregation battle. In 1965, Congress passed legislation that offered money to schools that did not discriminate. In these years, the real work of integration started (50-51). These years also saw the country galvanized by publication of the atrocities perpetrated by southern whites on their black brethren, and the passage of legislation like the Civil Rights Act in 1964 and the Voting Rights Act in 1965. The failure of the courts to achieve progress in attacking segregation between *Brown* and the involvement of Congress and the executive branch ten years later highlights the courts' inability to achieve major policy programs, like attacking the

edifice of racial discrimination in the South, without help from the rest of the federal government (49-65).[6]

Securing this assistance is not always certain. Distance on an ideological continuum between two actors corresponds to an increased probability of disagreement between those two actors on any given issue. Distance promotes disagreement. Further, Distance between two actors in ideological space makes disagreement between the two more potentially costly if one party is tasked with carrying out the decision of another. If the Court rules as it sincerely prefers, then ideological distance between the Court and the President means that the President stands to gain much from doing as she pleases rather than what the Court prefers. Increased distance means that the implementing party would enjoy increasing rewards for noncompliance—provided that he is able to get away with it. One can see this in the Nixon administration's attacks on the Court after *Swann* and *Alexander*: Nixon proposed that Congress pass a constitutional amendment to reverse *Swann*, and implemented *Alexander* half-heartedly by creating the state-action distinction (later adopted in *Milliken*) to limit the work the administration needed to do to implement *Brown* and its progeny.

If the President could act without any political or legal sanction, it is likely that she would simply ignore any Court decisions that order her to do other than as she likes.

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[6] Let us note that Rosenberg's (2008) theory relies on pressure from the public to spur other branches of government into action to support the implementation of the Court's decisions. This (political) salience is not always present, and its absence may handcuff the Court's decisions as the lack of salience makes the Court aware that it may not be able to rely on either assistance from other branches, or on the public to compel the other branches to act on its behalf. This is consistent with Hall's (2014) findings on the effect of salience in lateral cases as well, and for these reasons I will include salience in the models estimated below. I do not develop empirical expectations for the effect of salience, as Hall (2014) has already accomplished this task. Nonetheless, we keep its effects in mind when we consider the effect of ideological distance. Without salience to prompt the President to act on the Court's behalf, the Court's concerns over the reliability of implementation assistance are likely to be all the more acute.

The more she dislikes the Court's opinion (the greater the distance between her ideal and the Court's opinion), the more she gains from defying it.

The Court's behavior will change as the political conditions favor noncompliance. The Court will anticipate problems with implementation from the President, and shape its decisions to minimize the chance that the President will not comply. The Court then makes concessions to the executive branch so as to minimize the incentives for defiance.

5. How Does the Executive Branch Affect the Court?

The Executive Branch has myriad ways to influence the Court. Some have focused on the President's power to nominate justices to the Court (e.g. McGuire 1998; Moraski and Shipan 1999; Segal, Timpone, and Howard 2000; Hitt 2013). Others center on the influence of the Office of the Solicitor General (OSG), the government's chief advocate before the federal courts. These studies have found evidence that although the Solicitor General's reputation as the Tenth Justice depends on an apolitical reputation (see Wohlfarth 2009), his or her preferences can be modeled as a representation of the President's ideology (e.g. Bailey, Kamoie, and Maltzman 2005).

This research concludes that the OSG has a very high success rate as a litigant and amicus owing to its repeat-player status, the resources of the department, and the high quality of its attorneys (McGuire 1998). The OSG tends to perform well at oral argument, and lawyers who do so tend to win more often—even persuading their ideological opponents at times (e.g. Segal 1988; Bailey, Kamoie, and Maltzman 2005; Johnson, Wahlbeck, and Spriggs 2006). The OSG also has a strong influence on whether many justices vote to strike down laws as unconstitutional (Howard and Segal 2004).

The U.S. Supreme Court tends to be deferential to the federal government (e.g. Segal 1988; Howell 2003; Black and Owens 2012; Hall 2011; 2014). Most studies that have explored the mechanisms and extent of this deference have found that the Court tends to give the government what it wants in its decisions to grant certiorari and in merits outcomes. Some recent studies (Yates and Whitford 1998; Hall 2011; 2014) have divided the Court's cases into categories, among which there may be differences in how the Court responds to external political pressures. Yates and Whitford (1998) explored the Court's behavior in military and foreign affairs cases versus its behavior in domestic affairs cases, and tested how the Court responds to the President's preferences in each. Hall (2011; 2014) expands this categorization to "lateral" cases, which include military and foreign affairs, but also some domestic cases.

6. Lateral Cases

I have referred above to a special category of cases in which these concerns over implementation are acute. Yates and Whitford (1998) introduce this idea with reference to foreign affairs and military cases, and Hall (2011; 2014) expands this idea to the domestic sphere with his concept of lateral cases.

Lateral cases are "those in which the Court relies on non-judicial actors" to implement its decisions (Hall 2014, 353). Hall (2014) defines vertical cases first: those that involve civil liability criminal law, and judicial administration and then define lateral cases as "all others, e.g. those involving schools or government agencies." (352) Hall further clarifies the concept of lateral cases as involving "situations in which lower-court judges play no inherent role in the policy process and, therefore, do not directly control implementation." (355) Instead, in lateral cases, "[l]ower-court judges could try to

encourage implementation by issuing injunctions or, in extreme situations, holding resisters in contempt, but implementation ultimately depended on the cooperation of non-judicial public officials who tend to follow popular preferences." (356) The coding procedure is summarized as: "Cases were coded as vertical if they involve potential criminal penalties, potential monetary damages, or the internal administration of lower courts. All other cases were coded as lateral." (*Ibid*.)

I borrow the lateral case coding from Hall (2011; 2014) and use the fine-grained Spaeth issue areas that he designates as lateral. A comprehensive coding scheme is available in the Appendix.

The empirical analysis takes place in two parts. The first examines the effects of ideological distance on judicial voting patterns in merits votes. The second explores the mitigating or exacerbating factors on that relationship. Some political conditions favor noncompliance, and thus sharpen the Court's worries over non-implementation. Others make evasion more difficult, and so ameliorate the Court's concerns. To begin this analysis, I will examine Presidential attention (in the form of executive orders) to issue areas, and how it affects the Court's behavior.

The empirical tests to follow will first determine whether the risk of non-implementation, which increases in ideological distance, affects how the justices behave. This will establish whether such concerns generally do weigh on the justices.

I have two general expectations in the empirical analysis of this relationship. In lateral cases, as the ideological distance between the Court and President increases, the Court will rule increasingly often in favor of the federal government.

This expectation varies by case type. Only in lateral cases does one expect the Court to become sensitive to the preferences of the executive branch. In cases that do not require implementation by executive-branch actors, the preferences of the executive branch are not expected to alter the Court's decision-making.

The second expectation is that in vertical cases, ideological distance between the Court and President will not affect the probability that the Court will rule in favor of the government.

7. Models and Data

The data are taken from the Spaeth Supreme Court database, case-centered, from 1946 to 2016. The dependent variable is coded in terms of whether or not the Court resolved in favor of the federal government's position. The variable uses the Spaeth codes for whether each case was won by the petitioner or respondent, and coding cases as 1 if the petitioner won, and the petitioner was the federal government as such, or an agent or agency of the government. It was also coded as 1 if the respondent was the federal government, or an agent or agency of it, and if the respondent won the case. The dependent variable was coded as 0 for all other cases, including those in which the outcome was unclear.

The data are subsetted in two ways. The first model involves cases that are both lateral and where one of the parties was the federal government, or an agent or agency of it. The second model also uses cases where one of the parties is the U.S. government; however, it is estimated only for vertical cases. Recall that lateral cases involve issue areas in which the Court relies on the power of the executive branch to implement its

policies; vertical cases are those that are implemented mainly by lower courts, where the Court has stronger control over implementation.

The key explanatory variable is Distance, which is measured as the absolute value of the median justice's Judicial Common Space (Epstein et al. 2008) score subtracted from the President's Common Space (Poole and Rosenthal 1997) score. The lateral case category is taken from Hall (2014) for each by fine-grained Spaeth issue areas for all cases from 1946 to 2016.[7] This coding scheme categorizes each fine-grained Spaeth issue area as either lateral or vertical.

I also include a variety of control variables that also may affect the probability that the federal government wins each case. I include measures for the salience of a given case, and indicators for unified government, the presence of a major war, and for the first year of a President's term, the final year of a two-term President's time in office, and an election year in which an incumbent seeks reelection.

The effect of political salience on the Supreme Court has been explored in numerous studies. The evidence for its presence has been mixed, and the mechanisms behind it complex. For example, Casillas, Enns, Wohlfarth (2011) find that public mood directly constrains the Court's behavior; in salient cases, they find that "the Court is much more likely to act as a counter-majoritarian force and decide along ideological lines." (86) This finding is consistent with a finding from Epstein and Segal (2000), that justices' preferences are strongest in high-profile cases. McAtee and McGuire (2007) also find that the Court's attitudes are strongest in high-salience cases, and as a result, they are less amenable to persuasion by legal argumentation. By contrast, Unah and

[7] This allows expansion beyond the case-centered Hall coding scheme, which only codes cases from 1951 to 2007.

Hancock (2006) find that salience reduces the extent to which the Court can decide cases on their ideological preferences; salience, they claim, weakens the explanatory power of the attitudinal model. Giles, Blackstone, and Vining (2008) find that salience does not have a direct effect on the Court, but that judges respond to the same social forces that shape public opinion, meaning that there is a common underlying cause between popular preferences and Court behavior. The evidence for the effect of salience on judicial decision-making is still somewhat mixed, but due to the evidence that judicial preferences and decisions can be affected directly by the salience of a case, I believe it is important to account for its effects in this model. I include the Clark, Lax, and Rice (2015) measure of political salience.

Unified government may influence the success rate of the federal government in the Court as well. Prior evidence suggests that unified partisan control of government weakens judicial independence: McNollGast (2006) write, "we expect unified control of government to weaken judicial independence, as the legislature and executive can coordinate on governmental changes that may undermine the judiciary's independence. Stephenson (2011) models a similar proposition: politicians respect judicial independence to enforce mutual restraint--when their party is out of power, they want strong courts to protect them from encroachments from other parties, but this is a function of the competitiveness of the political environment: unified government means a less competitive environment, which means less respect for judicial independence. And, in cases that involve the executive branch as a litigant, one expects that the Court will be more likely to support the president if the justices know that Congress is aligned with the

president—a compelling example is the Court's eventual capitulation to the New Deal programs through pressure from Democrats in both the executive branch and Congress.

"One is reminded of the Latin maxim, *inter arma silent leges*. In time of war, the laws are silent," Chief Justice Rehnquist said in a speech to federal judges meeting in Williamsburg, Virginia. Because of a norm that this old maxim represents, and the need for executive powers to meet challenges during war that would be absent, or less severe, in peacetime, one might expect that during wartime, courts should more often rule in favor of the government. Epstein et al. (2005) does not fully agree, but finds that war does result in constraint for civil rights and liberties, and that war constrains court decision-making in non-war cases, but not in cases that are directly related to war—the authors propose that this is caused by the justices paying especially assiduous attention to the constitutional balance of powers during wartime. Nonetheless, Epstein et al. (2005) find an effect of war on the Court's behavior, and this effect shows itself most prominently in non-war cases, many of which are comprised in the lateral case categories.[8] I introduce an indicator that measures whether the case was decided during the following conflicts: the Korean War, the Vietnam War (post-Gulf of Tonkin incident), the Gulf War, and the invasion of Iraq.[9]

[8] It may be worth noting that simple t-tests of the federal government's success rates during war and during divided government show the opposite of what might be expected. A t-test between times of unified and divided government shows a positive difference of means, a greater win rate for the federal government during divided government ($p = 0.0288$). A t-test between times of war and times of peace shows a greater win rate for the federal government during times of peace ($p = 0.0132$).

[9] The following Court terms are included in this variable: 1950-52; 1964-1972; 1990; 2004-2008. A future version of this study will include an account for the war in Afghanistan from 2001 to the present day, as well. It should be noted that the effect of this omission is limited, because the extent of the data used in this analysis is limited to 2007 because of the Clark, Lax, and Rice (2015) salience measure, which is available only through that year. Yet, a full account of the War on Terror's effects should include the cases resolved during the war in Afghanistan as well as in Iraq.

I also control for whether the President's power to influence the Court is affected by the President's tenure in office. I expect that the Court may respond differently to the President's power depending on where a President is in her tenure. A lame-duck President is less likely to be taken seriously by the Court, and a newly inaugurated President is likely to enjoy a honeymoon period. The President's influence, then, will increase as time goes on, but then will decay as the President winds down her time in office. This expectation suggests that the relationship between the President's tenure and the Court's decisions is non-linear (quadratic). I measure the President's time in office by the number of months between the first inauguration and the oral argument of the case (if the case was not orally argued, I use the date that the decision was handed down). I then square the number of months to test for decay in the relationship between tenure and influence. I also include an indicator to measure whether the case was decided during the calendar year of a Presidential election, provided that the sitting President is seeking reelection. Later in this chapter, we will examine the interactive effects of these variables with the measure of ideological distance between the Court and the President.

Finally, I include a count of the number of executive orders issued for each issue area per Supreme Court term. Recall from above that the Court requires the assistance of powerful elites to provide incentives or impose punishment to ensure that its preferred policies take root (cf. Rosenberg 2008). Without this assistance, the Court is constrained, and cannot implement policy alone, as the post-*Brown* era amply demonstrated. If a President has not demonstrated any interest in a policy area, the Court may be more likely to rule against the government in a single case. If the President has been especially active in an issue area, and the Court rules against the government's position, then the Court

incurs a substantial risk that a crucial ally in the executive branch will not implement the Court's preferred policy. Indeed, courts uphold executive orders even when they are "of-at best-dubious constitutional authority . . . [or] issued without specific statutory authority" (Fleishman and Aufses 1976, 5; Mayer 1999).

The President's attention to a given issue area may make the Court more or less wary of challenging the President in that issue area, so to control for the potential effects of Presidential attention to a case in a lateral issue area, I include a count of how many executive orders the President issued across all lateral issue areas per term.

The table below displays estimates for three logistic regression models[10] that estimate the likelihood of a federal government win. Although all models are restricted to observations where the federal government was a party and estimated with the same independent variables, the second and third models are subsetted by whether the case type was lateral or vertical. Each coefficient is presented with standard errors in parentheses below.

[10] A different version of this model may employ a Heckman selection model in lieu of simple logistic regressions. This might be done to account for the selection bias in the Court's selection of its docket: if the theory above is valid, we might expect that the Court would select against the cases that present implementation problems. However, if this were so, it would tend to preclude finding significant results in a model like the ones constructed here. Such a model would be useful for a theory that bridges the Supreme Court to the courts of appeals, and models the federal government's implementation power as a curb both on the probability of granting certiorari, and on the outcomes of cases once they reach the merits stage at the Court. However, at this point, that these models find significant results consistent with the theory in spite of these selection effects is compelling. Future work may build on these results to model selection effects, and may find that the effect of the government's implementation power is yet more compelling than elaborated here.

TABLE 1: The Impact of Ideological Distance on Pro-Government Case Outcomes

	All Fed. Cases	Lateral-Fed.	Vertical-Fed.
Ideo. Distance	0.01 (0.27)	*1.14 (0.57)	0.12 (0.27)
Salience	-0.02 (0.07)	0.02 (0.14)	-0.03 (0.09)
Unified	*-0.27 (0.10)	0.05 (0.23)	*-0.36 (0.11)
War	^-0.19 (0.10)	-0.29 (0.23)	-0.16 (0.11)
Months	*-0.00 (0.00)	^0.02 (0.01)	-0.01 (0.01)
$Months^2$	-0.00 (0.00)	^-0.00 (0.00)	0.00 (0.00)
Election Year	*0.27 (0.12)	-0.07 (0.27)	*0.34 (0.13)
Executive Orders	*-0.06 (0.02)	*-0.12 (0.05)	^-0.04 (0.02)
Lateral x Ideo. Distance	*1.12 (0.55)	-- --	-- --
Constant	*0.65 (0.15)	-0.09 (0.43)	*0.85 (0.22)
Log- likelihood	-1,554.44	-309.19	-1,240.95
N	2,378	486	1,892

DV = 1 for a pro-federal government outcome in a Supreme Court case; = 0 for anti-government outcome, or outcome coded as unclear in the Spaeth dataset..

Note: Table reports the results of logistic regressions of U.S. Supreme Court case outcomes in all cases, then lateral issue areas, and then vertical issue areas. Standard errors reported in parentheses below coefficients. ^ $p \leq 0.1$; * $p \leq 0.05$

8. Results and Discussion

In the first model (all federal cases), the effect of ideological distance between the Court and the President is positive, but not statistically significant. However, see the

interactive term in the model fitted to all federal cases: the interaction of Distance with lateral cases is substantial and statistically significant, whereas the effect of Distance outside of the interaction is null. This predicts the effects that we see in the lateral-only and vertical-only models: that the effect is strong and detectable in lateral cases, and absent in vertical cases. All of this tends to support the expectation that ideological separation drives more deference to the government by the Court in lateral cases, where implementation is directed by the executive branch.

The baseline expectation for ideological distance between the Court and the President is that the Court should rule in the government's favor *less* often as distance increases. This is because ideological distance increases the likelihood that the Court and President will not see eye to eye on the merits of a given case. Yet we see that the result for ideological distance is not negative; it is positive, although it is not statistically significant. Why do we observe this counterintuitive result?

The key difference is in case types. The baseline expectation is not met because of the Court's differing responses to Presidential preferences in lateral cases, which require implementation assistance, versus vertical cases, where the President's preferences are not directly relevant to the disposition of the case. The effect of Distance varies between lateral and vertical cases because the President's preferences may present a roadblock to the Court seeing its preferred set of policies implemented as a result of the ruling they present in a case.

In the second column, we see that ideological distance prompts a greater likelihood of voting in the government's favor in lateral cases. But the third column shows that this effect is absent in vertical cases, where the President enjoys little to no

power to set or alter policy on the implementation of Court cases. The President's preferences appear to make little difference to the Court in those cases in which the courts are able to create and enforce policy on their own.

Exponentiating the coefficient of a logistic model gives the odds ratio, which represents the ratio of the probability of an event occurring given a treatment effect and the probability of it not occurring in the presence of that treatment. The odds ratio of this coefficient indicates that a one-unit increase in Distance corresponds to a 212 percent increase in the probability of a pro-government vote.

Consistent with our expectations, ideological distance does not have the same effect on the probability of a pro-government outcome in vertical cases that it has in lateral cases. This suggests that the distinction between vertical and lateral cases is what drives the Court's sensitivity to the government's preferences. The President's role in implementing policy causes the Court to become sensitive to her preferences. The Court is less willing to rule against the government when it depends on that government to implement policy in those lateral issue areas.

9. Conditional Effects: Presidential Power and Activity

The animating theme is the political environment, as far as it pertains to the power and activity of the President. The following sections will investigate how the power and activity of the President affect how the Court responds to the concerns described above. Broadly, we will expect that Presidential power and activity will exacerbate the Court's worry over non-implementation. We will measure the President's activity and power through the number of executive orders issued in each case's legal issue area.

The goal of this section will be to investigate how the President's power and behavior influence the Court through this worry over non-implementation. We will investigate political factors that pertain directly to the President's power, and willingness to use it, and table for now other political factors like the influence of Congress, partisan control of the government, case salience, etc. The conditional effects of these factors will be tabled until a future project.

In the following sections, I explore the factors that may sharpen or dull the concern over non-implementation. The previous sections have provided evidence that this possibility has an effect on how the Court decides lateral cases that involve the federal government. The following sections investigate the aspect of the political environment that may make the Court's concern either more credible and immediate or less so. I will focus on four, though there are numerous others that future studies might investigate. These are executive orders, popularity, and the President's time in office.

Executive orders are important for Presidents: they are used to make policy, to exert control over administrative agencies, and to maintain connection with electoral and governing coalitions (e.g. Mayer 1999). Presidents' use of executive orders corresponds with the political environment: when Presidents have opportunity to set policy through executive orders, without worry of overrule by Congress or the courts, they tend to do so (*Ibid*.; Mayer and Price 2002; Moe and Howell 1999; Mayer and Price 2002; Chiou and Rothenberg 2011). Executive orders are a way to model information conveyed about preferences from the President to the Court, and the intent to act in that area, perhaps in ways that the Court does not appreciate.

Thus executive orders are modeled as a way to express preferences that are salient in that issue area. They signal to the Court that the President has intent to do something in that issue area, so any attempts by the Court to try to set policy in these issue areas may be met with resistance or indifference.

If the effect of non-implementation concerns causes the Court to behave differently, as the results above suggest, then it stands to reason that this worry becomes all the more acute as the President's activity in a given issue area increases. It is likely that, for example, a President's signature issue area, one to which she has given much attention, would present extra problems for the Court as far as relying on the President to help the Court implement a ruling unfavorable to her preferences. That is, a President with a particular interest in constructing an agenda for an issue area may be all the more resistant to Court interference by a case decision that is at odds with her preferences.

One measure of Presidential interest and attention is the number of executive orders issued in that topic area. Courts have not developed a robust jurisprudential conception of the relevance or importance, the "special challenges and demands" of executive orders (Newland 2015, 2026). In the absence of a "thicker" conception of executive power and the relevance of executive orders, "doctrinal asymmetries that heavily favor executive power have emerged." (*Ibid*.) One such form is the longstanding practice of aggregating sources of law—multiple statutes or constitutional powers—to permit the President's executive order to stand (*Ibid.* at 2050). Presidents often fail to identify the legal sources of authority for their orders, leaving the courts to make excuses for them, essentially (*Ibid.* at. 2025-54). This approach leads to courts seeking to find ways to authorize the powers that the President seeks, by looking to multiple overlapping

sources of law when it seems no one in particular will do. The general idea is that courts defer to exercises of executive power for two reasons: because they are mindful of their limited ability to reign in executive power (especially if an executive order has already been issued and is in process of being implemented), and because courts lack the doctrinal tools to identify the proper place and limits of executive orders, instead employing a general policy of deference. This is general and long-standing practice for courts, and where the courts are especially sensitive to the need for executive compliance, their use of this doctrine is likely all the more frequent.

Using the Comparative Agendas categorization of American Presidents' executive orders, I tabulated all the executive orders issued in lateral issue areas. I coded each issue area in the Comparative Agendas coding scheme as lateral or non-lateral (vertical) based on whether or not the issue area involves the policy-making powers of the executive branch of government. I use the coarse issue area coding (also called "major topics") on the intuition that the Court would interpret Presidential attention to a general issue area as presenting problems for the Courts on implementation on all related subtopics. I then assigned to each case in the Spaeth dataset the number of executive orders that were issued in that year on the major topic into which that case falls.

Then, I estimated logistic regression models with the dependent variable the same as above: whether the outcome of the case was in the federal government's favor. The independent variables are Distance, coded as the absolute value of the President's Common Space score subtracted from the median justice's Common Space score. I code executive orders as the number of orders issued in a given year by the President in the same major topic area as the case involves. I estimate both Distance and the executive

orders variables separately, and interact them. I expect to find that the interaction between Distance and executive orders is positive.

TABLE 2: The Interactive Effect of Executive Orders and Ideological Distance on the Probability of Pro-Government Outcomes

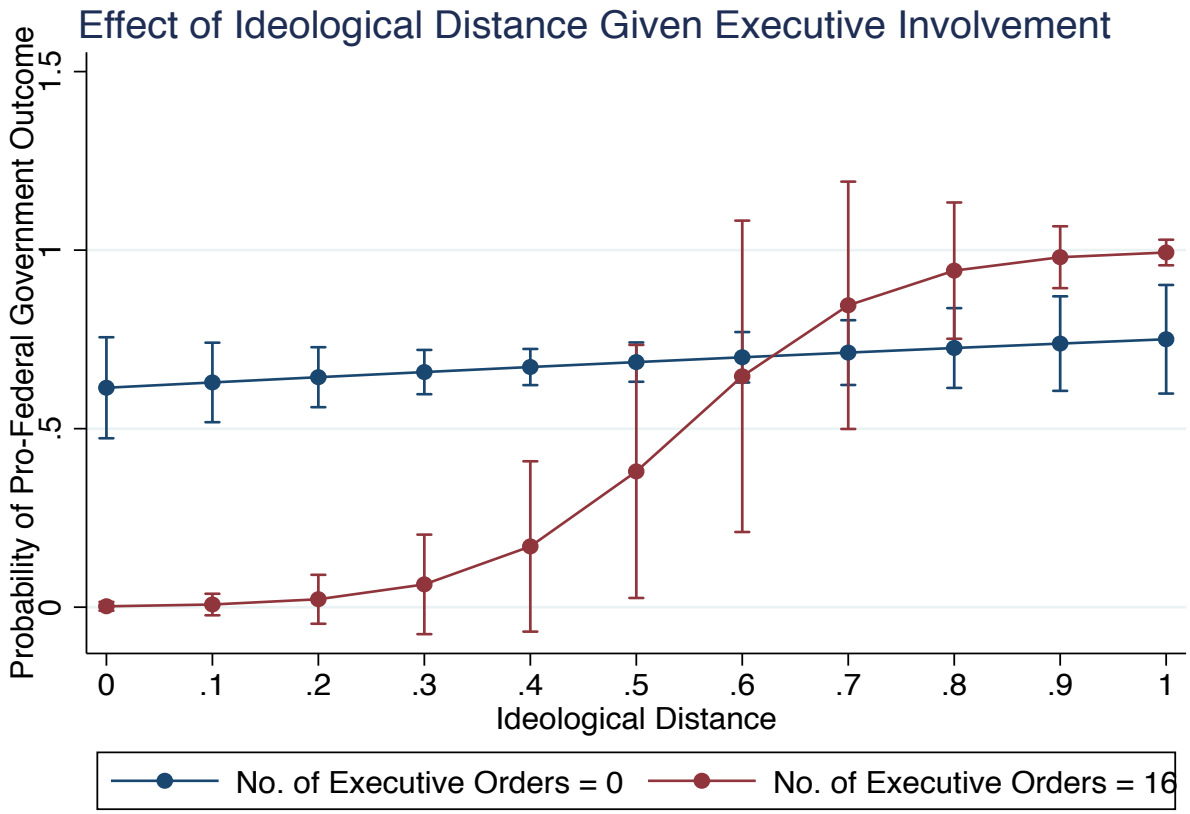
	Federal-Lateral Cases
Ideo. Distance	0.42 (0.64)
Executive Orders	*-0.48 (0.16)
Distance x EOs	*0.76 (0.31)
Months	^0.03 (0.01)
$Months^2$	^-0.00 (0.00)
Unified	0.03 (0.23)
War	-0.30 (0.24)
Salience	0.02 (0.14)
Election Year	-0.05 (0.27)
Constant	0.20 (0.45)
Log- likelihood	-305.98
N	486

DV = 1 for a pro-federal government outcome in a Supreme Court case; = 0 for anti-government outcome.
Note: Table reports the results of a logistic regression model of U.S. Supreme Court case outcomes in lateral issue areas. Standard errors reported in parentheses below coefficients. ^ $p \leq 0.1$; * $p \leq 0.05$

The interactive effect of Distance and executive orders in lateral issue areas reveals that the slope on Distance is insignificant when there have been no executive orders issued in lateral issue areas. The effect becomes distinguishable from 0 with the presence of just one EO, and climbs substantially as the number increases. The indicates that the President's involvement in an issue area draws the Court's attention. When the President is uninvolved, the Court feels secure in ruling without the same concern over non-implementation that we observe in previous models. But the President's attention to lateral issues makes the Court worry about how she will respond to an unfavorable ruling.

The plot below shows the effect of Distance on pro-government outcomes when the number of EOs issued is at its observed minimum (0) and at its observed maximum (16).

FIGURE 1



Partisan control of the government may also have an effect on the Court's concern over non-implementation. When the government is unified, the respect for judicial independence declines, and that the courts' political orientation is constrained by political competition (Stephenson 2003; Iaryczower, Spiller, and Tommasi 2002). The tolerance that federal authorities show to constraint by courts is a function of the degree of competition that each part faces from the other. Dominant parties have less reason to fear what will happen to them when the other party comes into power. "An independent judiciary is a mechanism through which these political competitors can enforce mutual restraint." (Stephenson 2003, 59) Without the need for the courts to protect the dominant party when they are out of power, the respect that a unified government must show to

judicial independence is decreased. Because the President is part of the dominant coalition during unified government, and because the incentive to respect judicial independence is decreased, the effect of distance on the Court's rulings should be strengthened.

During unified government, the Court is in political environment where they are aware that they are dealing with two branches of government unified, potentially against them. As distance increases during unified government, its effect on the probability of government success should increase too. The presence of unified government sharpens the effect of this concern on the Court's behavior. I expect the interaction of unified government and distance should be positive. Because respect for judicial independence decreases with unified government, the President will feel emboldened to treat the Court's opinions as she pleases, and will provide the Court with a shorter leash than she would if she had reason to fear the opposing party in Congress.

I tested to see whether the effects of distance vary between unified government and divided, and the results do not support expectations. This may be due to the differences in the kinds of cases present between unified and divided government.

10. Election Cycle and Tenure

In this section, we investigate the effect of a President's time in office on the Supreme Court's perception of their role in implementation. The general idea here is that when the President is nearing the end of her time in office, the Supreme Court may be less concerned about the President's position, and thus the effect of distance should be weaker.

I expect that when the Court is aware that the President's time in office is winding down, the justices will not take heed of her preferences as much as they otherwise would because the President is soon to leave office, and the next President will be at least partially responsible for the implementation of cases resolved late in a President's tenure. Past studies have shown that the President's power and activity in office declines during her final year in office (e.g. Mayer 1999; Mayer and Price 2002; Warber 2006). Knowing that they will soon have a new President should make the Court emboldened: the power of a soon-departed President over the implementation of cases before the Court is weaker than the power of a President at the beginning of her tenure, in which case the foreseeable future of any lateral cases before the Court lies in the hands of this one chief executive (see Howell 2003, 182-83, 186-87).

The President's power varies with her time in office. The first year in office is very important for a President's policy agenda, especially success in Congress (Warber 2006, 71). I expect a parabolic relationship between Distance and time in office: it will grow as President's gain more experience, but will decrease toward the end of her time in office because the Court will realize that the President will leave office soon, and will be less involved in implementing judicial policies.

If her power is at its apex, then the Court may be more wary than normal about ruling against the federal government, because to do so could provoke a battle with an adversary at the height of her powers. However, despite honeymoon popularity, new Presidents may not be effective in using their native powers. Using EOs as a proxy for unilateral powers, Mayer (2001) finds that there is no significant increase in the number of EOs in the President's first year in office (98). However, Mayer and Price (2002) find

that although there is an increased number of EOs in the first year of a new administration, this is only when the new President is from the opposition party. Presidents may be inclined to use their powers to fight battles *within* the Congress or the courts, but perhaps not more inclined to use their unilateral powers *against* the Congress or the courts. I then expect to find that the Court is less responsive to ideological distance from a new President, because while they may be powerful, new Presidents would rather battle in Congress than against the courts.

One other relevant factor may be that the Court does not yet know the preferences of the President, and thus cannot know how distant she is. While the Court will have received broad signals about the President's ideology due to campaign rhetoric and partisanship, these crude signals will be sharpened by more information as the President's time in office increases. This is one factor that will lead the Court to be increasingly responsive to the President's preferences as her time in office increases: time gives the Court more information about what the President's preferences really are. Further, as time goes on, cases involving the President's chosen policies and signature legislative achievements will work their way through the judicial hierarchy, possibly up to the Supreme Court. Cases involving the federal government early on may involve cases begun under the previous administration; the President may have little interest in how such cases are resolved on their merits. But with time, cases that involve the President's own actions or pet legislative projects may reach the Court, and the President's preferences in lateral cases may be directly relevant to how the case is resolved ultimately—and facing an intransigent President may produce the curbing effects detailed in previous sections.

And, as the time in office for the President reaches its constitutional limit, the Court will know that the cases it hears involving the federal government may be implemented by the next administration, not the current one. So, I expect that the effect of Distance from the President to the Court will follow a parabolic path with respect to her time in office. It will be lower at the beginning, reach its apex as time goes on, and wane as the President's time in office approaches its conclusion.

I expect that the effect of Distance will increase as a President's time in office goes on until it reaches an apex, after which it will start to decrease as the President's time in office draws to a close.

Election Years

This variable is coded 1 for all cases resolved during the calendar year of a Presidential election, if the incumbent President is running for reelection. I expect that election years will reduce the effect of Distance on the Court's decision-making, commensurate with the President's vulnerable position during a reelection campaign.

During a campaign, the President's record is under heavy scrutiny by the public, the news media, and the opposing party. By trying to persuade the public to return her to office, the President submits not only her personal and family life, but also her entire public record (especially recent political acts) at the judgment of enemies, allies, and the un-persuaded. Doing so means increased circumspection and assiduous attention especially from critics. During this period, the President's power may shrink, and her risk-aversion may swell.

Some recent studies have tried to track the President's power during election years by using executive orders (EOs) as a proxy. Some findings are inconsistent with one another, but they tend to find a decrease in Presidential power during election years. Warber (2006, 73-74) finds Presidents may use EOs during election years to build a policy record and achievements to impress the electorate, but empirically finds that Presidents issue fewer EOs in election years, especially Presidential election years—this is true for policy EOs and routine or symbolic EOs. Mayer and Price (2002) show that Presidents may rely more on their own powers in election years, but there is no detectable increase in the number of executive orders during those election years. Mayer (2001, 98-100) also suggests a null effect for election years on the frequency of EOs. So while there may be some theoretical reason to expect Presidents to use their unilateral powers to build a record of achievement, to fulfill pending campaign promises, or to persuade on-the-fence groups to join her electoral coalition, the empirical evidence is wanting. However, Moe and Howell (1999) find some evidence that there is an increase in EO issuance during election years, though it is worth noting that the statistical significance threshold employed by this study is generous.[11]

The model of Presidential behavior supported in this study is taking advantage of success post-hoc, not aggressively pursuing success before it happens. The Court is doubtless aware of the President's vulnerability; I expect the effect of Distance to decrease during election years if the incumbent is running.

[11] Presidents may use their unilateral policymaking powers in election years, although the evidence on this point is shaky. A model of Presidential power predicated on risk-aversion rather than ambition may fit real Presidential behavior better. Indeed, Ragsdale and Rusk (1999, 112) find that the outcomes of elections influence Presidential power—the greater the margin of victory, the more policy-significant orders a President is likely to issue.

I expect that the effect of Distance on the probability of pro-government voting will decrease during the calendar year before a Presidential election, given that the incumbent President runs for reelection.

TABLE 3: The Interactive Effects of Time in Office and Election Years on the Likelihood of Pro-Federal Government Case Outcomes in Lateral-Federal Cases

	Months in Office[12]	Election Year
Distance	*1.52	*1.71
	(0.64)	(0.73)
Months	-0.01	^0.03
	(0.03)	(0.02)
$Months^2$	0.00	^-0.00
	(0.00)	(0.00)
Distance x Months	0.08	--
	(0.07)	--
Distance x $Months^2$	-0.00	--
	(0.00)	--
Election Year	-0.04	0.59
	(0.29)	(0.70)
Distance x Elec. Year	--	-1.43
	--	(1.68)
EOs	^-0.09	^-0.09
	(0.05)	(0.05)
Unified	0.01	0.08
	(0.25)	(0.25)
War	-0.22	-0.24
	(0.27)	(0.26)

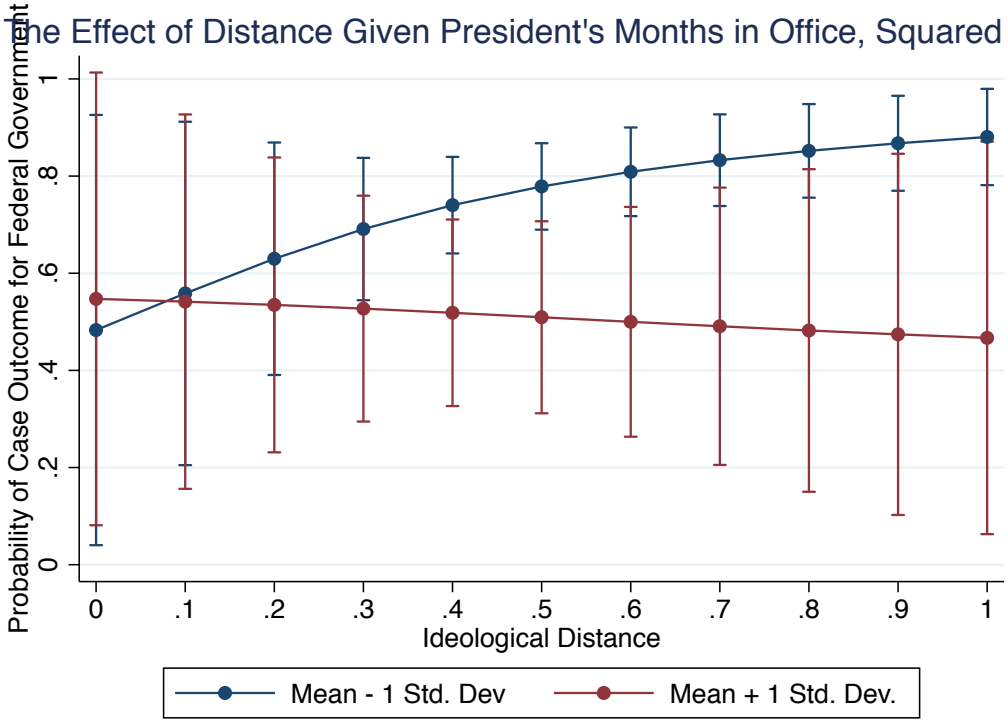
[12] To measure the effects of time in office, I include two measures: the first is the President's number of months in office when the case was orally argued (or decided, if there was no oral argument), mean-centered. The second is the mean-centered values of the number of months in office squared. I mean-center the measure of months in office because not to do so introduces two variables in the same model that are highly correlated with one another. Mean-centering avoids that. I then interact both measures with ideological distance.

Salience	0.05	0.06
	(0.15)	(0.15)
Constant	0.20	0.07
	(0.34)	(0.43)
Log- likelihood	-260.86	-261.27
N	413	413

DV = Pro-Federal Government outcome in Supreme Court case
Note: Table reports the results of logistic regressions of U.S. Supreme Court case outcomes in lateral issue areas. Standard errors reported in parentheses below coefficients. ^ $p \leq 0.1$; * $p \leq 0.05$

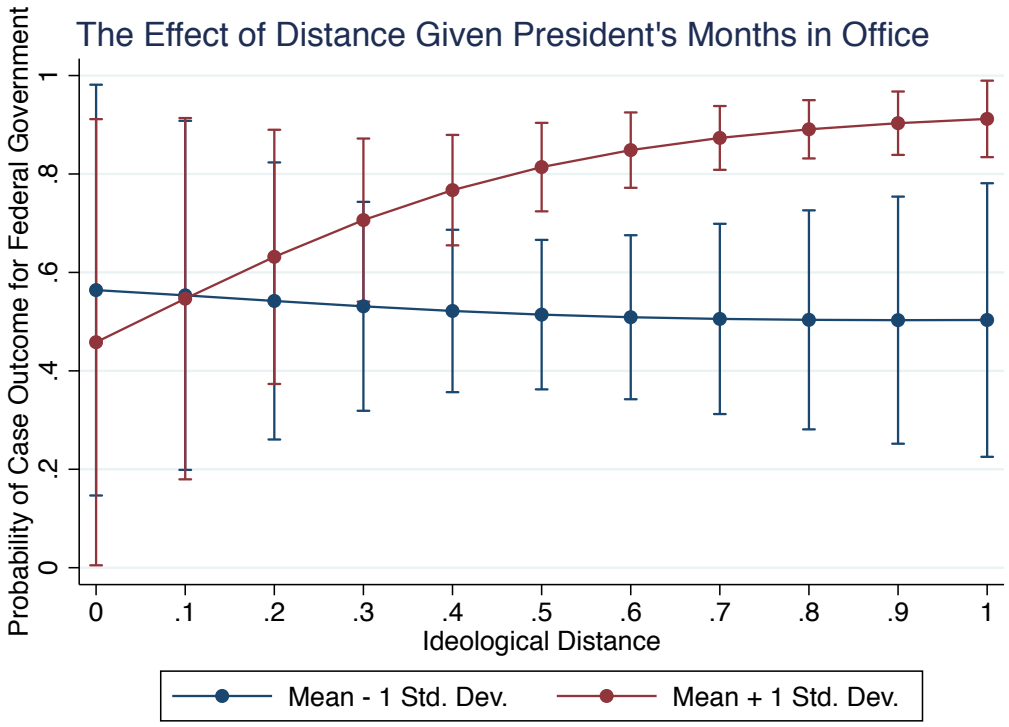
The variable measuring months in office squared has little effect on the slope of Distance, which is insignificant at three values of the months-squared variable: one standard deviation above the mean, at the mean, and one standard deviation below the mean.

FIGURE 2



I attempted the same method for the variable measuring months in office. The effect of Distance is positive and significant when the variable for months in office is held at the mean, and one standard deviation above the mean. This indicates that the effect of Distance is undetectable when the President is new in office, but grows as the President's time wears on. However, the quadratic nature of this relationship is in doubt. The effect does not appear to increase with time, only to decay at the higher levels of months in office. Graph 3 shows the effect of Distance on pro-government case outcomes given months in office held at one standard deviation above, and one standard deviation below, the mean. Notice that the results in these graphs are very similar.

FIGURE 3



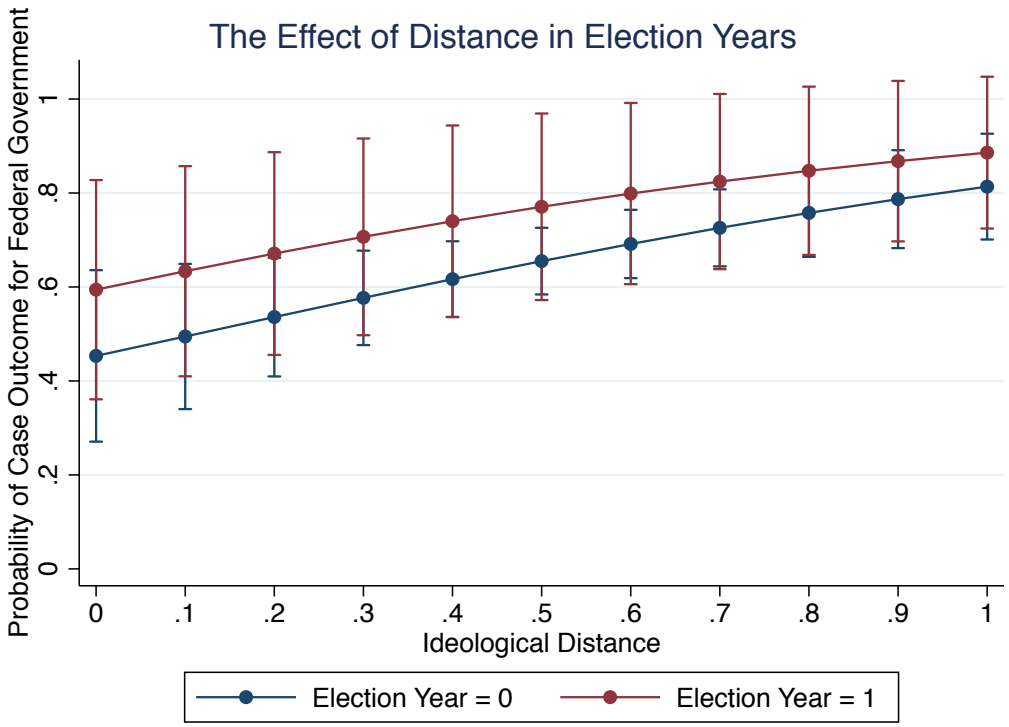
In conclusion, the relationship between the President's time in office and ideological distance does not appear to be quadratic. There is evidence that the effect of Distance is absent in the early days of a President's term, but this effect kicks in by the

time the President reaches the observed mean number of months in office. The effect remains as time continues; it does not weaken, as a quadratic interactive relationship would entail. However, below we will investigate the effect of the President's running for re-election on the Court's behavior given ideological distance in federal-lateral cases.

The slope of Distance is not affected by the fact that a case takes place during an election year. The slope of Distance is significant and positive in both election years, when an incumbent President is running for reelection, and in non-election years. There appears to be no difference in the effect of Distance.

See Graph 4 for a depiction of this effect. The slope is positive and significant under both conditions, but the slope is not detectably different between election years and non-election years.

FIGURE 4



11. Conclusion

This chapter has tried to achieve two broad aims: first, to explain the Court's anticipation of Presidential implementation of its cases and assess whether the Court responds to the concern about the possibility of non-implementation, and second, to explore the mitigating and exacerbating factors on the effect of that worry. There is evidence to support the theory that the Court responds *ex ante* to anticipated resistance by the President and the executive branch, and is prepared to offer the government an increased rate of deference to their positions as a litigant. Further, there is evidence that the concern over non-implementation is conditional on where the President is in her time in office, on whether there is unified or divided partisan control of the government, and on the President's involvement through executive orders.

One issue bears further elaboration: the comparison between two scenarios. This hypothesis asserts that the probability that the Court will rule in favor of the government is higher when the Court and President are distant than it is when they are ideologically congruent. This could appear to be a puzzling implication: the probability of pro-government ruling is *higher* with disagreement than it is when the President and Court are ideologically indistinguishable. If the Court and President are congruent, then how could the Court support the government *more* often when the Court and the President's government are ideologically divergent?

The answer is that even if the President and Court are ideologically congruent, there are still sources of disagreement that will impede the Court from ruling in her favor. If the Court is taken to be the President's ideological ally, then a ruling against the federal government would be a reliable signal that the merits of the case simply stack against the

government's interests—an anti-government ruling in such circumstances would demonstrate to the government that non-ideological factors like the legal merits of the case dictated the outcome. However, if the Court and President are ideologically divergent in lateral cases, the fear of non-implementation sets in, and the factors that might convince the Court to rule against the government would be less persuasive. That is, an ideologically divergent Court would not be able to rely on the idea that an anti-government ruling would be an objective signal as to the legal merits of the case. Instead, a ruling from a distant Court could be taken as an attack on the President's political agenda. Fearing that the President would retaliate for an offensive ruling, the Court might rule in the government's favor even more often that it would if it could rely on the idea that an anti-government ruling would be interpreted as an objective reading of the legal merits. A congruent Court has that ability; a divergent Court does not. So to prevent institutional retaliation, the Court may increase the rate at which it rules in the government's favor to a rate even higher than it would if the Court shared the President's ideology. That is, in summary, a Court that shares an ideology congruent with the President should agree with the government's position at a high rate, but not a perfect one, because more factors than just ideology bear on the Court's decisions. The results above suggest that in lateral cases, the probability of a Court ruling in the government's favor increases as ideological divergence increases. This suggests that the Court rules in the government's favor more often even as the likelihood of disagreement increases. So whereas one should expect to see increased disagreement, in fact one sees increased deference.

This would, of course, represent a substantial and noteworthy degree of deference. The Court should rule in the President's favor quite often if the two parties are ideologically congruent; if the rate increases with divergence, then it could present substantial problems for consistency in the rule of law, and an alarming tendency toward rubber-stamping the government's preferences in the many normatively significant legal issues that the lateral category comprises.

Allow me a moment to address another possible interpretation of these results. It is conceivable that the effect we observe in these cases is due to a change in the nature of the cases that the executive branch brings to the Court—that is, we may observe an increased rate of pro-government ruling because the executive branch moves toward the Court's preferred position rather than vice versa through the choice of cases that get appealed to the Court. This pattern may emerge because of the government's interest in securing victory at the Court, due to the far-reaching implications of Supreme Court decisions which establish troublesome legal rules which then must be upheld by the executive branch. The possibility of selection bias, either by the Court or by the federal government, should be the subject of a further investigation.

In the meantime, I will note that though this theory has facial appeal, it would not account for the distinction between lateral and vertical cases, as the results above evince. If the government were concerned about the creation of legal rules unfavorable to their ideological disposition, then presumably those rules would influence government behavior across all cases, vertical and lateral, especially in criminal procedure where the courts' control over issues is strong, and the government's ability to circumvent irksome rules is severely limited. Surely, for example, governments were annoyed at the rules

established in such cases as *Miranda*, *Silverthorne Lumber Co. v. United States*, or *Weeks v. United States*, and if possible, the government would have sought strongly to avoid such outcomes. Yet, we do not see such deferential behavior in vertical cases, despite the government interest in preventing the establishment of such rules in many of those crucial issue areas. However, in general, the possibility of selection bias and its role in the theory established above should be the subject of further study.

Future work should also test this theory by comparing the weight that legal regimes exert on the Court's decision-making under conditions that favor non-compliance versus conditions in which executive-branch compliance is irrelevant. If this theory is valid, then the relevance of legal regimes to the Court's decision-making is lesser when the Court fears non-compliance by the executive branch.

One should also account for the fact of the Court's discretionary control of its docket. The cases that reach the Court are not a random sample of disputes from lower courts, but are generally selected by the Court from a pool of certiorari petitions. It is possible—even likely—that the Court is less likely to select cases which involve the prospect of implementation problems by the federal government. Rather than take on a thorny case requiring the federal government to implement, or not to implement, some complicated set of policies, the Court may deliberately stay out of such cases. If this is so, then the models above have underestimated the effect of non-implementation worries on the Court, because the Court is likely selecting against cases that present such problems at the certiorari stage. Further research in this area should investigate the decisions of the Court at the certiorari stage—that is, whether the Court is less likely to take lateral cases under conditions that favor non-implementation (or whether it is less

likely to take cases that the government has won at the circuit courts). It is also worth investigating whether this mechanism affects the decision-making in the courts of appeals as well.[13]

In the next chapter, we will extend this theory from the outcomes of cases on the merits to the way that the Court constructs its majority opinions, a natural progression from the Court's behavior in deciding a case to choosing how to give direction to lower courts or executive agents once the case has been resolved. By employing the Linguistic Inquiry and Word Count software, the next chapter will investigate the Court's concerns over the President's cooperation in lateral cases versus the Court's behavior in vertical cases, and how the Court writes when the case has been won by the federal government, compared to when the case has been lost.

[13] One possibly contentious assumption is that there is no account for the directionality of ideological distance. That is, it is assumed that distance matters, even if the direction is different. If you have a "liberal" court that is two units distant from a very liberal President, one assumes that distance has the same effect as a two-unit distance between a liberal court and a moderately conservative president. However, this assumption is consistent with the idea of single-peaked and symmetrical preferences, which is a common assumption in spatial models of ideological preferences. Nonetheless, it is an assumption that must be made clear.

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APPENDIX: HALL CODING SCHEME

The following Spaeth legal issues are coded as lateral by Hall (2014). All issues not named here are coded as vertical.

Issue Code	Issue Description
20010	Voting
20020	Voting Rights Act of 1965
20030	Ballot access
20040	Desegregation
20050	Desegregation, schools
20070	Affirmative action
20090	Reapportionment
20140	Sex discrimination, employ.
20180	Poverty law, constitutional
20190	Poverty law, statutory
20230	Military: draftee
20240	Military: active duty
20270	Immigration: citizenship
20280	Immigration: denaturalize
20290	Immigration: access to ed.
20300	Immigration: welfare ben.
20310	Immigration: misc.
30090	Loyalty oath: govt. employ.
30100	Loyalty oath: political party
30110	Loyalty oath: teachers
30120	Security risks
30130	Conscientious objectors
30180	Parochiaid
40030	Due process: hearing, govt.
50040	Freedom of Info. Act
80110	State regulation of business
80130	Natural resources
80220	Fed. trans. reg.: rr
80230	Fed. trans. reg.: boat
80240	Fed. trans. reg.: truck
80250	Fed. trans. reg.: pipeline
80260	Fed. trans. reg.: airline
80270	Fed. util. reg.: electric
80280	Fed. util. reg.: nuclear
80290	Fed. util. reg.: oil
80300	Fed. util. reg.: gas prod.
80310	Fed. util. reg.: gas pipeline
80320	Fed. util. reg.: radio, tv

80330	Fed. util. reg.: cable tv
80340	Fed. util. reg.: telephone co.
90120	Jud. rev. of admin. agency
100010	Fed.-state ownership disp.
100020	Fed. pre-empt state leg, reg.
100040	Submerged Lands Act
100110	Supremacy: state tax
110020	State property dispute
130010	Legislative veto

Here I list some Spaeth issue areas that seem to missing from Hall's (2014) categorization. They were not included in my analysis for reasons of consistency with Hall's project:

20060	**Employment disc on basis of race, age, religion, illegitimacy, nat'l origin, working conditions**
20080	**Sit-ins over racial disc (why not this, if affirmative action, deseg, reapportionment?)**
20110	**Deportation**
20120	**Employability of aliens**
20130	**Sex discrimination (except for employment)**
20150, 20160	**(Indians)**
20260	**Immigration and naturalization: permanent residence (why the next one)**
30140	**Campaign spending**
50010	**Privacy**
50020	**Abortion**
50030	**Right to die**
110010	**State boundary disputes**

CHAPTER 2

1. Introduction

The U.S. Supreme Court tends to be deferential to the federal government (e.g. Segal 1988; Howell 2003; Black and Owens 2012; Hall 2011; 2014). All Presidents since the New Deal have enjoyed a success rate above 50 percent before the Supreme Court—some substantially higher. Most studies that have explored the mechanisms and extent of this deference have found that the Court tends to give the government what it wants in its decisions to grant certiorari (Segal 1988), and in merits outcomes (Hall 2011; 2014). Vanberg (2001) models that judicial opinions are constructed in part to mitigate the costs of possible non-implementation by the executive branch. Clark and Lauderdale (2010) locate Court opinions in an ideological-doctrinal space. Owens and Wedeking (2011) model opinion construction and clarity as a function of legal issue area, precedent alteration, and whether the opinion is in dissent or not.

This study builds on the literature on how the Supreme Court justices construct their opinions, and the literature describing how the Court responds to external political pressure. Studies on this topic present competing theories of how the Court responds to the prospect of nonimplementation—some studies suggest that the Court clarifies its wishes to make them unambiguous, and so that whistle-blowers may help the Court audit noncompliant agents or agencies. Others suggest that the Court is aware of the damaging political consequences of disobedience, and will obfuscate its opinions to conceal disobedience from the public. The study below explores the Court's opinion-writing when it has reason to worry about nonimplementation from the executive branch.

2. Implementation and the Court

Below, we examine the nature of the relationship of the Court and the government with regard to the implementation of the Court's decisions, and the cases in which the government may plausibly produce concerns over implementation.

As in the previous chapter, the central argument is that when the Court needs the President's compliance, and expects not to get it, the Court will be increasingly likely to side with the President so as to avoid internecine battles (Hall 2011; 2014; Canon and Johnson 1999; Rosenberg 2008; Black and Owens 2012; Pacelle 2015). "The reputation of the judiciary is imperiled when its rulings go unheeded. The institution's reputation and prestige derive from, as much as they contribute to, the willingness of other political actors to heed court rulings." (Howell 2003, 160)

Judges care about the policies that result from their decisions (see e.g. Segal and Spaeth 2002; Segal 1997; Clark 2009; George and Epstein 1992; Brace and Hall 1997; Howard and Segal 1994; Bailey, Kamoie, and Maltzman 2008), and they care about the institutional integrity of the courts, which is damaged to the extent that executives can perform noncompliance with impunity (e.g. Howell 2003 Ch.6; Black and Owens 2012; Pacelle 2015). Black and Owens (2012) suggest that the Court sides with the President's administration because if they do not, then the President will evade or punish the court for the ruling; Johnson (2003) also argues as much, noting that the Court seeks out amici from the Office of the Solicitor General when the President enjoys high public approval.

This premise also suggests that judges will anticipate how executives will respond to their decisions, and will take steps *ex ante* to ensure compliance. And the

Court may construct its opinions, which provide the commands and justifications for their preferences to the executive branch, to mitigate this possibility.

So, the possibility of a President who disagrees with a decision may change the Court's behavior in lateral cases, where the Court cannot control the implementation of the case in the executive branch. There exists evidence to suggest that the fear of non-implementation changes the judges' behavior in a variety of ways. The next section will investigate previous literature for theories as to how the Court creates opinions when facing the prospect of non-compliance from other institutions.

3. Effects on Supreme Court Opinion Construction

In this chapter, I consider how the Court builds its majority opinions under conditions that favor non-compliance by the federal government. Several previous studies have explored judicial opinion-writing behavior as a tool to secure compliance from lower courts and institutions that may have reason to shirk the implementation of the Court's opinions.

Several mechanisms are at work for how courts construct opinions in conditions in which compliance is doubtful. Two broad theories for how courts respond to this concern are labeled here: clarity and obfuscation.

The Virtues of Clarity

There are three theoretical reasons for clarity in a Court opinion: 1) to remove discretion; 2) to help whistle-blowers; 3) and to communicate wishes clearly (Black et al. 2016, 82). The theory at work here is that clarity in opinions makes agents like lower

courts more likely to comply with the Court's decisions. Clarity makes the Court's wishes clear and unambiguous, and aids whistle-blowers in signaling to the Court when its wishes are contravened. Black et al. (2016) notes that clarity forecloses opportunities for expansive interpretation by lower courts and administrative agencies, which gives them decreased leeway to implement the Court's decisions in self-serving ways. Unambiguity helps the Court to achieve its preferred outcomes by preventing lower-court judges and administrators from using ambiguity to implement their own policies rather than cleave to the Court's wishes. We might think of one famously ambiguous phrase from the Court's history as illustrating the dangers that come from a failure to set clear requirements: state governments abused the "all deliberate speed" standard in *Brown II*, twisting it to the point of consciously dilatory tactics.

In conditions that favor non-compliance, the Court clarifies its thinking to make its wishes unambiguous, and to help whistle-blowers signal to the Court when disobedience is occurring (Black et al. 2016). Clarity removes the ambiguity that lower courts and others can use to evade Court opinions (Black et al. 2016, 27; Corley 2009; Pacelle and Baum 1992). Staudt (2004) claims that when legal precedent is clear, unambiguous, and narrow, lower courts follow it (659) because clear precedents prevent the lower courts from hiding disobedience behind plausible deniability. The Court may use clarity as a tool to force lower courts into a binary decision: either to abide by the Court's clear direction, or to defy it unambiguously. Rather than risk open rebellion, lower courts, as well as executive agencies, may follow the Court's express wishes rather than be forced into a public battle. The Court may use clarity to force this uncomfortable choice onto lower courts and executive agencies. Songer, Segal, and Cameron (1994)

claim that litigants help the Court to audit the lower courts by appealing cases that involve shirking, knowing that such cases will quickly attract the attention of the higher courts (also see Black and Owens 2011b; Brent 2003).

Corley and Wedeking (2014) argue that expressing certainty enhances the persuasion of the message to lower courts charged with implementing Supreme Court precedents. As to the administration, Spriggs (1996) finds that courts achieve compliance with executive agencies by writing clear and explicit opinions. Wasby (1993, 371), Staudt (2004) and Corley and Wedeking (2014) show that when legal precedent is clear, unambiguous, and narrow, lower courts follow it (659). Lower courts treat precedent from the Supreme Court better when its language is clear and it expresses more certainty.[14] Clarity removes discretion (Black et al. 2016, 26). Canon and Johnson (1999) add that the greater the ambiguity, the greater the range of possible (acceptable) interpretations (49). Clarity removes the ambiguity that opponents can use to evade it (27). Corley (2009) and Pacelle and Baum (1992) make this point for lower courts, and Black et al. (2016) add that when the Court writes opinions involving less competent agencies, it will write clearer opinions because these agencies are more likely to interpret and apply the Court's reasoning in ways that the Court does not endorse.

Clearer opinions are likely to be taken as legitimate, and believed (Benson and Kessler 1987). And Black et al. (2016 article) claims that when the Court anticipates public opposition to their opinions, the justices write them more clearly (703). Spriggs (1996) argues that clearer opinions generate more faithful implementation (also see Baum 1981, Johnson 1979a; Krislov 1972; Wasby 1970; Sabatier and Mazmanian 1979).

[14] There is a tension here then: larger majority coalitions are more likely to produce compliance, but also more likely to produce muddled opinions.

Clarity allows agencies to anticipate how their actions will be perceived and sanctioned depending on their behavior in the future. The absence of clarity also allows agencies to interpret them in narrow (or otherwise self-serving) ways (570-71). Ambiguity may widen the range of possible acceptable interpretations (Canon and Johnson 1999, 49).

Concerns about implementation may create other incentives regarding opinion constriction as discussed in the next section. The key idea below is that because clarity imposes a binary choice on implementers—either obey or clearly defy—the costs of noncompliance to the Court become higher because any disobedience is publicly visible, and may damage the public prestige on which the Court relies.

The Virtues of Obfuscation

Some studies suggest that in conditions favoring noncompliance or overrule, the Court will obfuscate to increase the costs of reversal (like in Congress), or to mask from the public the disobedience of administrative agencies. Such disobedience can be damaging to the public's perception of the Court. Owens, Wedeking, and Wohlfarth (2013) note, "Opinion language that significantly obfuscates the Court's decision may impose less constraint on interpreting and implementing actors." (36) Lack of clarity from the Court may impose less constraint on other political actors.

Owens, Wedeking, and Wohlfarth (2013) argue that when dealing with Congress, the Court reduces clarity in its opinions to increase the costs of statutory overrule or undermining. Courts shield themselves from review by increasing the costs of review for supervisors; that is, courts craft opinions so as to increase the costs of other institutions reviewing and countermanding their decisions. The Court obfuscates language to

circumvent unfavorable review from politically hostile Congress. Justices alter the language of their opinions to raise costs of legislative review and thereby protect their decisions from overrule or undermining by Congress.

Owens, Wedeking, and Wohlfarth's (2013) thesis is that the Court obfuscates their opinions to prevent overrule or undermining by Congress. In a similar vein, King (2007) claims that policy-makers create features of their decisions to make supervision more difficult, and that as such the Court is more likely to use constitutional legal regimes, rather than statutory interpretation, when they are ideologically distant from Congress. Smith and Tiller (2002) claim that opinion construction does not prevent disobedience or overrule from Congress or the administration, but opinions can decrease the probability of unfavorable review by increasing the costs of review. The idea is that more complex decisions are harder to monitor because doing so requires much of the Congress' valuable time, which could be spent on advancing an agenda that maximizes their chances of reelection. There are nonetheless times in which the Congress will choose to spend its time attacking a Court opinion because a case could be public enough and unpopular enough to justify the Congress' time. However, most do not rise to that level, and unclear opinions require more time to comprehend and undermine when compared to simpler opinions. Tiller and Spiller (1999) note that when facing judicial review, agencies employ high-cost approaches to dissuade the Court from employing this tool. Finally, Schanzenbach and Tiller (2006) explain the role of opinions, and their strategic use of facts and legal interpretation, in that lower courts rely on factual review rather than legal interpretation when deviating from sentencing guidelines to make it costlier for reviewing courts to override their interpretations. All of these studies support

the premise that courts often craft their opinions strategically to ward off overrule or undermining from other agencies of government.

The Court's worries in this context are many. First, the justices worry that their decisions might be used to empower the executive branch in ways that the Court does not like, or second, that the executive branch might be ordered to stop some course of action, and will not do so. A third concern might be that the executive branch will find some way to circumvent the Court's reasoning or preferences (i.e. using a different tactic to accomplish the same goal, or claim it needs more resources before it can comply). One important difference between legislative-judicial interactions and those studied here is that the executive branch does not consider overruling the Court's opinions by statute, as does Congress (Owens, Wedeking, and Wohlfarth 2013), which may respond to the Court's decisions by statutory override, or passing legislation to combat even constitutional decisions (i.e. RFRA). Here, the executive branch has limited power to override or undermine Court decisions—the executive has no legislative authority to do so. The executive branch does not review; it acts pursuant to the court's opinion, possibly allowing itself more leeway than the Court would like. So the key here for the Court is that their decisions might be used to empower the executive branch more than the Court would like, or that the executive branch, ordered to stop some course of action, will not do so, or will find some way to circumvent the Court's reasoning or preferences.

So the idea that the Court might obfuscate to raise the costs of overrule is only partially applicable. It is possible, in some scenarios that the Court seeks to stop a policy favored by the administration. The Court might then write a complex opinion, offering the administration a convoluted set of conditions under which they might continue their

plans, but making the conditions too complex to justify the added costs of complying. However, even in these conditions, the Court's use of added complexity may backfire: the agency may delay implementation indefinitely due to its complex requirements, eventually ignoring the decision or implementing it halfway. In these situations, complexity might work against the Court by frustrating the agency that might otherwise comply with unambiguous and simple directions.

But there is another mechanism behind obfuscation: preventing public embarrassment. Staton and Vanberg (2008) create a formal model of opinion writing with respect to implementation by executive agencies. The thesis of this model is that disobedience by executive agencies is extremely costly to the Court's public prestige, on which it relies to impose its rulings on agencies and other branches. The prospect of disobedience, as we saw in the first chapter, is worrisome to the Court; as a result, the Court's strategy is to obfuscate its opinions to make disobedience more difficult to detect. In this model, the Court is more or less resigned to agency disobedience, and seeks to hide this embarrassing conflict.

This model seems to follow naturally from the results of last chapter. The finding there was that in cases where the executive branch controls implementation, the Court is careful not to provoke disobedience, on the understanding that non-implementation from the executive branch harms the carefully cultivated perception of the Court as an immutable oracle of law. To protect itself from internecine battles with the executive branch, we saw that the Court increases the rate at which it sides with the government so as not to provoke clashes.

So one mechanism is that the Court will make its opinions unambiguous so as to communicate its wishes clearly, to foreclose options for misinterpretation, and to enable whistle-blowers to signal to the Court when deviations are occurring. Another mechanism is to obfuscate, either to conceal disobedience, or to increase the costs of overrule or reversal.

Clarity or Obfuscation?

In cases where the Court is concerned about implementation, the literature is divided between theories that suggest that the Court should make itself clearer, and those that suggest it will obfuscate.

The clarity theories emphasize that ambiguity can lead to overbroad interpretations of the Court's directions, decreased support from whistle-blowers, and decreased public support. The obfuscation theories say that non-clarity can help to mask institutionally costly disobedience, and can raise the costs of overrule or avoidance by hostile institutions.

For our purposes, we will focus not on Congress or the lower courts, like many previous studies, but on the executive branch only.

The theories on the Court' opinion writing to administrative agencies are mixed—Staton and Vanberg (2008) suggest obfuscation; Black et al. (2016) suggest clarity. But the discrepancy here may merely track the difference between lateral and vertical cases—indeed, Black et al. (2016) suggests that clarity helps the Court keep whistle-blowers alert, which implies that deviations can be fixed with further litigation, the hallmark of a vertical case, or by alerting Congress. Disobedience of this kind in the administration can

be monitored and rectified through whistle blowing, clarity of instructions, and lack of ambiguity. And this makes perfect sense—when the Court can itself, or reliably through the lower courts, control implementation of the case and its progeny; that is, when the cases are vertical.

However, in lateral cases, the Staton and Vanberg (2008) theory also seems plausible. The Court obfuscates to mask the appearance of disobedience in the administration, which would prove very costly with the courts' public reputation. That is because compliance in one case is less valuable than revealed non-compliance, which reverberates across cases. Policy loss in one case is better than legitimacy loss, which extends to all cases. However, it is true that if the Court cares about the policy that results from its opinions, there will need to be clarity in the Court's wishes. What this theory claims that the Court will want to avoid is imposing the kind of choice explored in the last section: strict adherence, or outright defiance. The example of Brown II from the prior section may be illustrative here: obstruction was the result of the Court's ambiguity in the "all deliberate speed" standard, but the other alternative may have been worse. If the Court had elaborated some specific time table for desegregation, it would cast its vulnerability and dependence on executive powers into sharp relief if the timetable were not met. That is, the defiance of the southern states and the reticence of the federal government would be framed as outright defiance, which would be costly to the Court's public image.

There is a tradeoff between clarification and implementation: clarification makes wishes clearer, but also makes disobedience easy to spot, and costly for the Court's public reputation. Staton and Vanberg (2008) claim that when courts anticipate that

political actors will refuse to comply with their decisions, they publish more ambiguous opinions. (38) To avoid looking weak by having agencies openly defy them, courts obfuscate to mask noncompliance, especially as the perceived legitimacy of the courts decreases.

Another mechanism, the whistle-blower mechanism, is useful primarily in vertical cases because taking intransigent agents back to court can be an effective way to stop their shenanigans. But in lateral cases, where most policy-making occurs in the executive branch, outside of the Court's direct control, this is not likely to be as effective because the courts have limited power to alter the course of executive policymaking.

Clout

In addition to complexity, I propose to examine the Court's clout, the air of confidence that they project in their opinions. Previous research has established that software analysis like LIWC can reveal emotional states even when the authors do not discuss them. Tausczik and Pennebaker (2010) argue that examining language like LIWC "provides important clues as to how people process …information and interpret it to make sense of their environment." (19) Pennebaker and Law (2002, 273) claim that the LIWC software examines how individuals express themselves instead of what they are saying. Word choices also inform us about deeper cognitive patterns; they inform about things that the writer is not discussing (Stirman and Pennebaker 2001; Newman et al. 2003; Zullow et al. 1988). Other studies focus on the role of projecting certainty and confidence as methods of persuasion (Hazelton, Cupach, and Liska 1986; Sniezek and

Buckley 1995; Yates et al. 1996; Sniezek and Van Swol 2001). Clearer opinions are likely to be taken as legitimate, and believed (Benson and Kessler 1987).

Previous research has suggested that confidence can help to persuade people, which in this setting could aid the court in securing implementation for its decisions. "Strong, persuasive" (Corley and Wedeking 2014, 38) opinions enhance the probability of compliance and implementation by lower courts. Assertive messages tend to be more persuasive (Hazelton, Cupach, and Liska 1986; Sniezek and Buckley 1995), and other research shows that consumers appreciate even extreme confidence (Yates et al. 1996; Sniezek and Van Swol 2001). Principals who are display more confidence are trusted more (Sniezek and Van Swol 2001). But this may not apply in this setting because the relationship in lateral cases is not principal-agent; previous studies have focused on the relationship between lower courts and the Supreme Court as a principal-agent model (also see Songer, Segal, and Cameron 1994), but not so for the Court-executive branch relationship. And executives have strong preferences that are not constrained by courts (formally but not always practically), and have constituencies that they need to please even against the Court's wishes.

Generally, we might expect clout to decrease in lateral cases, and complexity to decrease (if the clarity models are correct) or increase (if the obscurity models are correct). But these effects, and the Court's behavior in writing majority opinions, will vary also between federal wins and losses.

Federal Wins and Losses

The studies mentioned previously often fail to make predictions—theoretically—between the federal government's wins and losses before the Court. Below we explore the differences in expectations for complexity and clout for cases that the government wins, and cases that it loses.

The complexity of a Court opinion should depend a great deal on the outcome of the case. If the federal government wins, the Court does not need to be very concerned about compliance. However, in federal losses, the Court will be concerned about implementation: the Court may obfuscate to prevent the appearance of disobedience from the implementing agents (Staton and Vanberg 2008) or they may clarify to make the implementation subject to their closer control (Black et al. 2016).

As for clout, in cases that the federal government wins, the Court does not need to fear non-implementation so their confidence should be greater; the Court here, in a sense, is working with the federal government, not against them, so their language need not reflect the weakened position that might supply itself in federal losses. In cases that the federal government has lost, the Court may become aware of its weakened powers over policy in lateral cases, and the opinion's language may reflect the Court's vulnerable position in its language..

Other Influences on Opinion Control

I include several control variables, drawn from the literature on opinion construction that may affect the dependent variables.

The first is the number of votes in the majority coalition. This is because the clarity of an opinion is dependent on the number of justices that the opinion must satisfy (Owens and Wedeking 2011), and opinions with larger coalitions tend to be more complex. Owens and Wedeking (2011) also remind us that dissenting opinions, which tend to have only one author, are usually the most charismatic and simple opinions (1033-34) because they do not, in tone or content, need to satisfy different points of view. Several sources on opinion construction employ this count as a control or a variable of interest in their models (e.g. Corley and Wedeking (2014); Owens and Wedeking (2011); Staudt, Friedman, and Epstein (2008); Epstein et al. 2008; Maltzman, Spriggs, and Wahlbeck (2000); (Black et al. 2016b); Kassow, Songer, Fix (2012); Zink, Spriggs, and Scott (2009); Benesh and Reddick (2002); Hansford and Spriggs (2006)).

Another control is the presence of a declaration of unconstitutionality in a case. One reason for this is that it is a proxy for a measure of legal salience[15] (Corley and Wedeking 2014); others include the differences in complexity in such cases as compared to cases that see no use of judicial review. Owens and Wedeking (2011) argue that because judicial review is a powerful and controversial tool, the Court must take special care to justify its use of this tool to the public and to other departments of government. It

[15] I call the reader's attention to the different concepts that salience can measure, and the way that each is represented in this study. Here, the Corley and Wedeking (2014) study uses declarations of unconstitutionality as a proxy for legal salience—the counterpart of which is political salience. The distinction, of course, is between issues that present broad implications for legal doctrine in federal or state law, but which do not attract broad public attention because their effects on public policy or daily life are modest. This is the measure of legal salience; a declaration of unconstitutionality may be momentous for legal doctrine and structure, but its significance may escape the attention or interest of the legal laity. By contrast, political salience refers to the public's attention to a case irrespective of its effects on the operation of the legal or judicial culture. Often, cases are both or neither, and a case presenting broad implications for legal doctrine, especially in salient matters like civil liberties, can politically salient by dint of its legal salience. The correlation between these variables encourages researchers to account for both in empirical models. I have attempted to do this by including measures like unconstitutionality, consistent with the practice of previous studies, and also including the Clark, Lax, and Rice (2015) metric of political salience, which is constructed from newspaper coverage across the country.

is a dramatic step, so judges must take pains to minimize negative repercussions (1036). Sources in which this control has been employed include Owens, Wedeking, and Wohlfarth (2013); Owens and Wedeking 2011; Corley and Wedeking (2014) and Black et al. (2016 book).

For similar reasons, I also include an indicator for overrule of a Supreme Court precedent. Owens and Wedeking (2011) note that cases in which precedent is overruled tend to be written unclearly because of the extra steps at justification that such a dramatic step requires. The norm of stare decisis is important in legal reasoning. It produces reason by analogy, a common tool in legal reasoning: similar outcomes result from similar cases; the law applied to two similar fact patterns produces similar outcomes. The norm is powerful and self-imposed by the judges, but for strong prudential reasons (Epstein and Knight 1996). Hansford and Spriggs (2006) add that precedent alterations bear the burden of being explained more thoroughly than most opinions; the justices must explain both trashing the old rule, and justify the new rule. Such opinions will be more complex and less clear. Sources in which this control has been employed include Owens, Wedeking, and Wohlfarth (2013); Corley and Wedeking (2014); Owens and Wedeking 2011; Zink, Spriggs, and Scott (2009).

I also include fixed effects for each legal issue area[16] that is represented in my data sample. The reason is that there is some evidence that the justices' writing styles differ between issue areas. Owens and Wedeking find, for example, that justices systematically write simpler opinions in criminal procedure cases. Although there was no similar pattern found in other issue areas, and although all criminal procedure cases

[16] There are a total of seven issue areas in the Spaeth categorization over which lateral cases span. They include First Amendment, Due Process, Privacy, Unions, Economic Activity, Judicial Power, and Federalism.

are vertical, and not lateral, I include the controls for issue area in case such differences do exist, either in the complexity of Court opinions, or in the clout that the justices project in some issue areas over others. Sources in which this control has been employed include Black et al. (2016a), Owens and Wedeking 2011, and Black et al. (2016b).

Another important control is the political salience of a case, which refers to the degree of coverage that a case receives in news media. The Court may write simpler opinions, and perhaps more forceful and confident opinions, when the justices know that their audience is not the legal elite and government officials, but the general public. Black et al. (2016) find that the Court writes its opinions more clearly when they know that their audience is the public (703), and especially when their decisions run counter to public preferences. Because the Court relies so much on the diffuse support (Gibson et al. 2003, 365) that they have stored in the public mind, the justices know that when they rule in a way to which the public objects, they must take special care to justify themselves so as to mitigate any loss of support. Clarity helps when going against public preferences because clarity helps them explain their reasoning to the public, other studies show that clearer opinions are likely to be taken as legitimate, and believed (Benson and Kessler 1987). Sources in which similar controls have been employed include Corley and Wedeking (2014), Owens and Wedeking (2011), and Black et al. (2016a; 2016b).

I include also a count of the total number of amicus briefs filed in a case. Owens, Wedeking, and Wohlfarth (2013) use this as a measure of complexity; cases with more amici filed tend to span a broader conceptual range, and also signals public attention. As stated above, public attention is likely to alter the justices' authorial voices, and the conceptual breadth of a case is likely to alter its complexity. Sources in which this

control has been employed include Black et al. (2016b), Owens, Wedeking, and Wohlfarth (2013), and Spriggs (1996).

Finally, I include fixed effects for each opinion author. I do this as a way to control for the idiosyncrasies of each opinion author; we know from previous literature (Owens and Wedeking 2011) that opinion authors have distinct authorial voices. Sources in which similar controls have been employed include Owens, Wedeking, and Wohlfarth (2013), and Owens and Wedeking (2011).

The models below have standard errors clustered on term to account for heterogeneity in the conditions across terms (cf. Owens, Wedeking, and Wohlfarth 2013; Black et al. 2016b).

4. Expectations

So, let us now step back and assess how our theory predicts that all these factors interact. We will begin with the framework from the last chapter: the vertical-lateral framework. This reflects the principle from the previous chapter: the Court anticipates non-implementation. This concern arises in lateral cases, and only when ideological distance increases. In the last chapter, we found that distance corresponded with a greater probability of supporting the federal government's position in a case.

I will test competing theoretical perspectives on the use of complexity in Court opinions.

A) If complexity is higher in lateral cases than in vertical cases, it would suggest that it is because complexity helps to obfuscate and mask noncompliance.

B) If complexity is less in lateral cases than in vertical cases, it would suggest that the clarity models are better supported.

If Clout is reduced in lateral cases than in vertical cases, it would reflect the Court's awareness of its weak position.

As for federal wins and losses: I expect that the dimension of Clout will be lower in federal losses when compared to federal wins. I also expect that complexity will decrease in federal wins, and in federal losses, both theories will be tested. If complexity increases, this will support the obfuscation model. If it decreases, this will support the clarity mode.

5. Linguistic Inquiry and Word Count (LIWC) Methodology

This study employs three dimensions derived from the Linguistic Inquiry and Word Count (LIWC) software. As such, it behooves us to rehearse the LIWC methodology and the dimensions to be employed.

The LIWC software employs a word count strategy: searches whatever text under review for key words or word stems. The software uses the judgment of researchers in the subfields of social, clinical, health, and cognitive psychology to determine which words correspond with various emotions, thinking methods, social concerns, and parts of speech. The software searches target text to determine whether words or word stems in the dictionary appear in the text. LIWC assigns each word in a text to predetermined dimensions that have been categorized by independent examiners to measure the thinking styles of individuals. The LIWC dictionaries were developed with the idea that language provides important clues as to how people process information and interpret it in light of

their environments (cf. Tausczik and Pennebaker 2010, 19). The program then tallies up the words used in each dimension; then provides a descriptive tally of the text as a whole: the percentage of words in the text that belong to each dimension.

The version of LIWC employed in this analysis is from 2015, and categorizes text based on word use along many dimensions. For this study, I will employ three: Analytic, Clout, and Words-per-sentence. The first two, Analytic and Clout, are new to this version of the LIWC software, and are coded along a 0-100 scale for analytical or formal language, and language that is authoritative, confident, and exhibits leadership, respectively. Words-per-sentence is the average number of words per sentence in any given body of text: in this case, the Court's majority opinion (not including footnotes, concurrences, dissents or appendices). I take Analytic and Words-per-sentence to represent the complexity and legal sophistication of the opinion. According to the LIWC Operator Manual, the Analytic dimension "reflects formal, logical, and hierarchical thinking; lower numbers reflect more informal, personal, here-and-now, and narrative thinking." (Pennebaker et al. 2015, 22) The analytic content of the opinion may reflect the depth and complexity of thought in the opinion, the extent to which the opinion embodies formal and abstract thinking rather than narrative or personal expression of opinion. I will also employ Words-per-sentence as a dependent variable as a check for robustness.

Clout measures the position of strength from which the Court speaks. One in a position of authority and confidence will score higher on the Clout dimension; this metric reflects the power that the Court projects. According to the LIWC Operator Manual, "a high number suggests that the author is speaking from the perspective of high expertise

and is confident; low Clout numbers suggest a more tentative, humble, even anxious style." (Ibid.) The key term on which this analysis is built here is "confident": I expect that the Court knows when it relies on the executive branch for implementation assistance, and that the confidence of its opinions will vary with how sure they are that the executive branch will abide by their preferences. The clout of an opinion corresponds with the Court's confidence that their opinions will upheld faithfully, not ignored or twisted by an opportunistic executive branch. Lower clout numbers should reflect the Court's anxiety and decreased confidence that their opinion will be taken as binding and authoritative by the executive branch.

Dimension 1: Complexity

This concept refers to a body of text's analytic sophistication. Below, this concept will be measured with two LIWC dimensions: Analytic, and words-per-sentence.

When faced with the possibility of non-implementation, the Court may use analytic sophistication in two ways. First, I propose that analytic sophistication may be a way for the Court to persuade the executive branch authorities that the case's outcome is dictated by reason, and by the technical intricacies of the law. Second, I propose that this is a way for the Court to foreclose the possibility that legal experts (say, in the Office of Legal Counsel) will find legal justifications for implementation of policies preferred by the President, and contrary to the interests of the Court. As examples of this, see the instances above from Nixon's presidency of the need for careful opinion-crafting in *U.S. v. Nixon*, and also for the problems of legal justification of policies preferred by the executive branch but not contemplated by the courts (*Alexander* and *Swann*).

By increasing the formal sophistication of the opinion, the Court may attempt to declare that the case's outcome and its requirements are the product of detailed and careful thought, and cannot be circumvented. By decreasing the analytic sophistication, the Court may be trying to foreclose the possibility of willful misinterpretation, as the Court did in *U.S. v. Nixon*. If the opinion's language may constrain plausible interpretations that would allow the President to substitute his or her preferences for the Court's, then simple, direct language with short, clear sentences may offer the Court its best chance to prevent willful misconstrual.

As opinions become more cognitively complex, they become less clear. Owens and Wedeking 2001 (1038) identify two elements of cognitive complexity: differentiation and integration. Differentiation involves the degree to which an individual perceives or explains multiple perspectives or dimensions associated with an issue; it represents the degree to which an individual may perceive shades of gray. Integration describes the degree to which a person recognizes relationships and connections among perspectives or dimensions in an issue. (1039) These collapse into single dimension of cognitive complexity. The least complex opinions are "one dimensional, evaluative rules in interpreting events" (Gruenfeld 1995, 5) in which actors make decisions based on only a few salient pieces of information. More complex opinions tend to provide interpretations of events on multidimensional terms and integrate lots of evidence to arrive at decisions (Tetlock, Bernzweig, and Gallant 1985, 1228). It is possible that this integration of evidence and information could help, rather than hinder, the Court in justifying its position and foreclosing possible avenues of misinterpretation. Simple and direct may be

clearer, but it is possible that a more complex and sophisticated approach can account for, and parry, a greater number of self-serving avenues of implementation by the President.

However, less cognitive complexity in an opinion may indicate an ability to pierce through to the essence of key matters. Increasing cognitive complexity may reflect muddled, confused thought, even vacillation. These may, for our purposes, reflect the justices' desires to produce opinions that are a) easy to understand and hard to misunderstand so that implementers know exactly what to do and are either constrained to, or happy to, carry it out, or b) difficult to understand, reflecting an effort to obscure inevitable disobedience, or to offer such latitude that what might otherwise seem to be excessive license afforded by executives to themselves would be considered a plausible and foreseeable interpretation of a vague directive. Either outcome is possible: sophistication and complexity could be used to ensure principled justification, or the Court may decrease complexity to foreclose the possibility of misinterpretation. However, below, the expectation will stake its claim that the complexity of the opinion will decrease with ideological distance, reflecting the Court's desire to be as clear and direct as possible when dealing with an executive branch that may wish to implement policy different from that ordered by the Court.

The variables that I will use to measure the concept are Analytic and words per sentence (WPS). The latter is self-explanatory: it is likely that a body of text written with longer sentences is more complex than a body of text with shorter sentences. The text may not be more conceptually complex, or reflect more complex ideas, but it will be written with a more abstruse, dense style. The Analytic measure from LIWC indicates

that "a high number reflects formal, logical, and hierarchical thinking; lower numbers reflect more informal, personal, here-and-now, and narrative thinking." (22)

Dimension 2: Clout

This concept refers to a body of text's confidence and assuredness that its directions will be followed. LIWC provides a dimension called Clout that tracks this tendency.

Confidence and persuasiveness may increase as the chances of non-compliance increase, if judges craft opinions that project power and authority. But this is a risky proposition: if judges craft opinions with confident, thundering language, which then are ignored anyway, they are made to look all the more impotent. The judge may persuade the executive to comply through his words, but he also risks devastating political repercussions and institutional damage if even the judges' most powerful language ends up a dead letter. The possibility of non-implementation simply causes the Court to write in a less self-assured manner, knowing that the executive branch will implement the decision outside of the Court's control. I measure this concept with the LIWC variable Clout. The first indicates that the "author is peaking from the perspective of high expertise and is confident; low Clout numbers suggest a more tentative, humble, even anxious style." (22) A lower Clout score may suggest that the Court is tentative in anxious in the tone it uses to address the federal government.

I refer back to the Pennebaker et al. (2015) manual, which defines Clout as a measure of confidence and "high expertise" (22), whereas its absence corresponds with tentativeness, humility, and even anxiety. We might expect differences in this measure

given the case type: in vertical cases, which involve issues that the judicial branch can implement without much outside help, the Court sits at the top of a hierarchy, a status which should correspond with higher measures of this variable given its measure of confidence and expertise. Being at the top of the judicial pecking order gives the Court all the more reason to assert its expertise with confidence. But in lateral cases, where the Court seeks cooperation from coequal branches of government, in a relation that has no clear hierarchy, the uncertainty over the outcome of a power struggle with the executive branch may decrease Clout, which would correspond with the tentativeness and anxiety associated with lower measurements of this variable.

So, the judge might instead craft opinions will less confidence when good-faith implementation is questionable. Given that the theory emphasizes the dangers of institutional damage, I propose that clout will decrease with the probability of non-implementation. Next I address the theory behind how these dimensions will be used: the risks that the Court runs when it believes that the executive branch will not implement its decisions in the way that the Court declares, or intends, and how the Court behaves to mitigate that possibility and its risks.

6. Data and Methods

The data for this study are taken from the Spaeth Supreme Court Database, case-centered (2017). To identify those cases that raise implementation concerns, I use Hall (2011; 2014), and I use all lateral cases from the Hall (2014) coding scheme, which distinguishes all Supreme Court cases as either lateral or vertical. The latter are those cases that can be disposed within the judicial hierarchy, without relying on the

policymaking power of the Executive Branch (e.g. criminal procedure cases). Lateral issues are those that require implementation assistance from the Executive Branch (e.g. desegregation, military and foreign affairs). I restrict the cases used in this analysis to those that are both lateral and involve the federal government (as such, or any of its agents or agencies) as a direct party before the Court. That is, the federal government must be a litigant before the Court, not simply an amicus. This way, the ideological distance between the President and the Court is most important, given that the President may play a powerful role in the extent to which the federal government complies with the Court's decision. I use all cases identified by Hall as lateral issues, and a random sample of vertical cases from 1946 to 2016. I include only cases that produce an opinion of the Court.

Ideological distance is coded as the absolute value of the Common Space score of the Court's median justice subtracted from the Common Space score of the President at the time that the case was orally argued (or decided, if the case was not orally argued).[17]

The dependent variables are derived from the LIWC software. I copied the majority opinions from each of case, and used the LIWC (2015 version) software to analyze them on the Analytic and Clout dimensions, as well as average words per sentence. I only include Opinions of the Court, and limit the analysis to cases that

[17] Some studies suggest that the median of the majority coalition, more than the median of the Court, is the pivotal actor for opinion construction (e.g. Clark and Lauderdale 2010; Carruba et al. 2012). As such, I attempted to estimate the models below by estimating distance as the absolute value of the majority median and the President's Common Space scores. The models fit poorly, and no hypotheses were supported. I will proceed with the Court median as the measure of the Court's preferences, because evidence exists that the median of the Court exerts influence over opinion content in addition to the influence of the majority median (Bonneau et al. 2007; Carruba et al. 2012, 408-10). As such, I believe that evidence to be found in support of this theory from a measure of distance that takes the Court median as the position from which ideological distance from the President may be assessed.

involve the federal government as a litigant. The scores for each opinion derived from the software provide the dependent variables.

7. Difference-in-Means Tests

Below I present three difference-in-means tests. They show the difference in means between all three of the LIWC variables measured between lateral and vertical cases. Recall that our first three expectations concerned the difference in the three LIWC variables between lateral and vertical cases that involve the federal government. The first expectation claimed that Clout will be greater in vertical cases; the second claimed that words-per-sentence will be greater in vertical cases; and the third claimed that Analytic will be greater in lateral cases.

The table below shows that the difference in Clout between vertical and lateral cases is not significant—and although the differences between vertical and lateral cases for words per sentence and Analytic are significant, the Analytic difference is small, and the results from those two measures give mixed evidence for the theories above. The smaller number of words per sentence in lateral cases tends to support the clarity model, as shorter sentences tend to be clearer. However, the higher Analytic score (though a tiny margin) would tend to support the obfuscation model.

Table 4: Difference-in-Means Tests Between Lateral and Vertical Cases

	Mean (Vertical)	Mean (Lateral)	Difference	Number of Obs. (Vertical/Lateral)
WPS	20.31	19.29	*1.02	(400/791)
Analytic	96.27	96.50	*-0.23	(397/793)
Clout	52.87	52.90	-0.03	(397/794)

* indicates that the probability that the difference in means does not equal zero is less than 0.05.

Table 2 presents the results of difference in means tests between cases that the federal government wins and cases that it loses, in lateral cases.

Table 5: Difference-in-Means Between Federal Wins and Losses in Lateral Cases

	Mean (Losses)	Mean (Wins)	Difference	Number of Obs. (Wins/Losses)
WPS	20.35	18.60	*1.75	(481/310)
Analytic	96.60	96.44	0.15	(482/311)
Clout	52.93	52.89	0.04	(483/311)

Only words-per-sentence displays a significant difference between cases that the federal government wins versus those it loses. The results show that there is a significant increase in words per sentence in cases that the federal government loses. The Court's language appears to be simpler in cases that the government wins. This supports the obfuscation theory, as it appears that in federal losses, the Court's language grows more complex, which may reflect an effort to conceal disobedience with a lack of clarity.

8. Models and Results

Below, I estimate separate sets of regression models with standard errors clustered on the Court term. We shall see what the effect of ideological distance is on the Court's writing style, and will discover more evidence for the theories laid out above.

The expectation for ideological distance is that it will decrease Clout in federal losses, when the Court must attempt to frustrate the government's efforts. The complexity measures will test the competing hypotheses derived from the existing literature. If complexity is higher in lateral cases than in vertical cases, it would suggest that it is because complexity helps to obfuscate and mask noncompliance. But if complexity is less in lateral cases than in vertical cases, it would suggest that the clarity models are better supported.

One set of models estimates the effect of ideological distance on the LIWC measures in lateral cases. These tests will determine whether the complexity and clout measures differ between cases that the federal government wins compared to those it loses, supplementing the difference-in-means tests above. Another set of models will explore the effect of ideological distance.

Table 6: Bayesian Linear Regression Models of Majority Opinion Complexity and Clout

	WPS	Analytic	Clout
Ideo. Distance	*-3.23	0.35	^-3.60
	(1.30)	(0.56)	(2.08)
Majority Votes	*-0.34	0.05	0.27
	(0.11)	(0.05)	(0.18)
Salience	-0.16	-0.09	0.09
	(0.26)	(0.11)	(0.42)
Precedent Alteration	0.86	-0.97	-0.49
	(1.61)	(0.67)	(2.55)
Unconstitutional	0.51	-0.08	2.66
	(0.75)	(0.31)	(2.55)
Amici	-0.04	0.02	0.03
	(0.08)	(0.04)	(0.14)
Cabinet	-1.05	-0.17	0.86
	(0.37)	(0.16)	(0.60)
Constant	19.62	*82.67	*44.79
	(11.76)	(11.98)	(11.76)
N	567	567	567
Thinning Parameter	10	10	10
Burn-in	5,000	5,000	5,000

Gibbs sampling. Uninformative priors. MCMC Sample Size: 100,000
DV = LIWC measures for each model, labeled above.
Note: Table reports the results of Bayesian linear regressions of U.S. Supreme Court federal case opinion characteristics in lateral cases. The dependent variable is listed above the column of posterior means from each model. The fixed effects for opinion authors and legal issue areas are estimated but not reported for the sake of brevity and simplicity.
Traceplot diagnostics suggest convergence.
* indicates that 95% credible interval of the parameter's posterior distribution does not overlap with 0.
^ indicates that 90% credible interval of the parameter's posterior distribution does not overlap with 0.

Notice that ideological distance decreases the Clout metric, consistent with expectations. This suggests that the Court's language reflects awareness of their weakened position in lateral cases, and when the ideological distance between the Court

and the President increases: that is, when the Court's preferences diverge increasingly from the President's preferences.

Also notice the mixed results from the complexity measures. The average number of words per sentence in a Court opinion decreases as ideological distance increases, which tends to support the clarity models. The Court responds to uncertainty over implementation of their opinions in the executive branch with shorter sentences, suggesting that their tactic is simplification and clarity of directions. However, the Analytic score is unaffected by ideological distance. This suggests that the Court's sentences are shorter, but their opinions no more or less abstract and sophisticated. This may tend to support the clarity model, but the evidence is not conclusive.

The models below explore the effect of ideological distance in lateral cases between cases that the federal government wins compared with those it loses.

Table 7: Bayesian Linear Regression Models of Majority Opinion Complexity and Clout: Ideological Distance in Federal Wins and Losses

	WPS	Analytic	Clout
Ideo. Distance	-3.42	-0.29	*-6.13
	(2.02)	(0.92)	(2.77)
Majority Votes	0.08	-0.05	0.26
	(0.14)	(0.06)	(0.18)
Salience	-0.88	-0.19	0.08
	(0.33)	(0.14)	(0.41)
Precedent Alteration	-0.34	-1.55	-0.71
	(2.24)	(0.95)	(2.52)
Unconstitutional	1.31	-0.56	*2.55
	(1.00)	(0.42)	(1.26)
Amici	0.08	-0.01	0.04
	(0.16)	(0.07)	(0.14)
Cabinet	-0.06	-0.16	0.81
	(0.49)	(0.22)	(0.60)
Federal Win	0.02	0.53	-2.08
	(0.96)	(0.42)	(1.39)
Federal Win x Distance	-0.17	-1.29	4.18
	(2.41)	(1.08)	(3.04)
Constant	16.07	82.41	*45.53
	(12.30)	(12.07)	(12.05)
N	567	567	567
Thinning Parameter	10	10	10
Burn-in	5,000	5,000	5,000

Gibbs Sampling. Uninformative priors. MCMC Sample Size: 100,000
DV = LIWC measures for each model, labeled above.
Note: Table reports the results of Bayesian linear regressions of U.S. Supreme Court federal case opinion characteristics in lateral cases. The dependent variable is listed above the column of posterior means from each model. The fixed effects for opinion authors and legal issue areas are estimated but not reported for the sake of brevity and simplicity.
Traceplot diagnostics suggest convergence.
* indicates that 95% credible interval of the parameter's posteriior distribution does not overlap with 0.
^ indicates that 90% credible interval of the parameter's posterior distribution does not overlap with 0.

We see in the table above that the effect of Distance varies between federal wins and losses. In federal losses, the results resemble those of the previous table: Distance decreases Clout, and the average number of words per sentence, but it increases the Analytic measure. However, it is also apparent that the effect of Distance shifts in cases that the federal government wins. The posterior mean on the interactive term between Distance and federal wins is not distinguishable from zero with much confidence. This means that although the effect of Distance in federal losses in negative and significant, the difference in effect between federal wins and losses is not detectable. So, I estimated the effect of Distance while restricting the data to include only federal wins. The posterior mean of Distance in federal losses is approximately -6.13, and the posterior mean of Distance in federal wins is indistinguishable from zero.

Note also that there is no detectable effect for any of the three LIWC measures given only that the federal government has won the case. The indicator variable for a federal win does not appear to have any detectable effect on the complexity or clout of the Court's opinions in these lateral cases. The posterior mean on federal wins in the Clout model comes closest to detectability, but does not reach it by conventional measures. This could mean that given Distance held constant, the effect of ruling in the federal government's favor is negative—tending to produce a less assertive opinion. This could be inconsistent with the theory above, which suggests that federal victories would secure the Court in knowledge that its opinions would be implemented faithfully, the Court having (largely) deferred to the government's position. However, the results do not produce evidence strong enough to reach this conclusion securely.

A brief note about the nature of posterior distributions and assessing statistical significance: hypothesis testing in the Bayesian world is more straightforward than in the frequentist world. Whereas a confidence interval shows that, were a study to be repeated with further draws of data from a theoretically infinitely repeatable data-generating process, 95% of the studies would show a coefficient value in that range, the Bayesian credible interval is simpler. It gives the probability that the value of the parameter (in this case, a coefficient) is within a certain range. Bayesian studies typically use the same significance thresholds as frequentist studies: if the 95 or 90-percent credible interval does not overlap with zero, this is acceptable reason to reject the null hypothesis.

However, in the case of some of the coefficient values above, we may still have reason to conclude that there is some evidence to support the hypotheses above. Take the coefficient on the covariate Distance in the Words-per-Sentence model. In general, a standard 0.05 significance test, if met, indicates that 95% of the posterior density of a parameter lies below zero because the upper bound for a 90% test is less than zero, but the test is equal-tailed, so there is 5% of the density at the other end of the distribution which is not accounted here; because it is a two-tailed test, only 5% of the distribution is 0 or above. So, a 0.1 Bayesian p-value test, which is two-tailed, indicates that 95% of posterior is below 0, whereas a 0.05 significance test would indicate that 97.5% of the distribution does not overlap with zero. This means that there is a 95% chance that the coefficient is less than zero. In the case of the Distance parameter in Words-per-Sentence, a two-tailed test reveals that 91% of the density of the posterior distribution is below 0. This test does not meet standard significance levels, but it provides some

evidence of the effect predicted above. There is, according to these results, a 91% chance that the coefficient's value is below zero.

The posterior means on Distance in federal losses reflects the patterns from above, in part. The average words per sentence decreases with Distance, although the Analytic dimension is unaffected. However, in federal wins, the effect of Distance decreases the number of words per sentence yet more. The posterior mean of Distance on average words per sentence in federal wins is approximately -3.54, and clearly distinguishable from zero.

The Analytic dimension is unaffected by ideological distance in federal losses, but in federal wins, the effect of Distance may decrease Analytic (~94.5% of the posterior distribution is below zero). These results continue to provide mixed evidence for the clarity and obfuscation models.

9. Conclusion and Further Research

The results above support the idea that the Court's writing behavior changes in cases that present the fear that the executive branch will not faithfully implement the Court's decisions. We found that there is a difference between the Court's writing behavior between lateral and vertical cases, and found that ideological distance drives this difference, at least as far as Clout and words-per-sentence goes. We found that this effect was present in lateral cases, but not present in vertical cases, supporting the belief that the Court's worry over implementation is the driving force between these differences in opinion construction. We also found that there is evidence for the clarity models proposed by most of the literature, which proposes that clarity helps the Court to achieve

compliance, through the decreased average words per sentence in Court opinions as implementation problems become more acute. But the results above also provides some support for the obfuscation models, which propose that obfuscation protects the Court from political damage from noncompliance, through the increasing Analytic scores when implementation problems arise. There is much work left and much development left to do in this analysis, but the initial results suggest that the Court's opinions reflect the political environment in which they were produced.

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CHAPTER 3

Introduction. We know from the previous chapters that Court cases are influenced by pressure from the executive branch. Is it acceptable in a constitutional democracy for the executive branch to wield such influence over the highest court? Is this an intrusion of politics into law? I assess arguments on both sides of this question, beginning with an argument in favor of the normative value of this influence.

I. Yes: Political Influence on the Court is Desirable

Recent scholarly attention to judicial review, as one example of major judicial behavior that may be best subject to political control, has argued that courts are not the proper forums for deliberations of principle.

Jeremy Waldron has recently given a powerful account of the un-democratic nature of JR. He writes of JR: "…it is politically illegitimate, so far as democratic values are concerned: By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights." (Waldron 2006, 1353)

His conception of democracy is key to this attack. Like many other conceptions, e.g. Dahl's polyarchy (1998), his is rooted in political equality and institutional outputs. Laws are made and public policies set by the people and their representatives working through elective institutions, which are limited by universal adult suffrage, a representative, elected legislature, fair and regular elections, and all undergirded by the value of political equality. Institutions, procedures, and legislative practices are "kept

under constant review from this perspective, so that if there are perceived inequalities of representation that derogate seriously from the ideal of political equality, it is understood among all the members of the society that this is an appropriate criticism to make that that, if need be, the legislature and the electoral system should be changed to remedy it." (1362)

The legislature is left to do this of its own accord.

Waldron acknowledges that votes must count equally, decision procedures must be fair, and majority decision by electoral bodies must be a fair and neutral procedure between alternatives. Majority decisions among legislators are a proxy for majority decision among individuals, he claims. (1387-88) The response to a person who objects to the outcome of a political contest is to justify majority decision making in general: "We give each person the greatest say possible compatible with an equal say for each of the others." (1388-89) That is, the power over a decision is to be maximized for each person, as long as it can be maintained as equal.

But like most theories, Waldron's account of democratic decision-making a) does not account for the formation of preferences; b) does not account for the possibility that legislative bodies can concentrate power away from individuals or groups either deliberately or de facto; c) it may pay lip service to the need to maintain equal power among individuals, but does not account for the possibility that judicial review may be necessary, not just convenient, to do this exact thing: to preserve the equal distribution of power that constitutes democracy. And if JR serves this purpose, it is not clear how

Waldron could object, as it would bolster the very argument from democracy that he would use to oppose it.[18]

Another problem with Waldron's approach is that is provides a political answer for a philosophical question. The extent of rights, the boundaries of governance and power exercised over individuals, is a question that philosophers have grappled with for centuries. As Hamilton pointed out, legislatures must not be the judges of the extent of their own powers (Rossiter ed. 1961, p. 466-470); this violates the basic principle that no one should be the judge in his own case. Because the extent of rights is at base a philosophical, not a political, question, Dworkin's definition of the best courts as ones that are equipped to address the philosophical arguments that come before them becomes relevant. Dworkin gives courts the distinct role of forums of principle, distinct from the forums of policy, which comprise legislatures and executive departments (Dworkin 1985, 33-71). Because the construction and boundaries of rights are philosophical questions, the branch of government best suited to answer them should be responsible for determining their boundaries. The only branch of government that is consistently able to pose and answer philosophical questions is the one insulated from the tumult of electoral politics: the judiciary.

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[18] Kaufman and Runnels (2016), in responding to Waldron's account of JR, extract an idea that "[t]he defining quality of democratic government is…not unconditional fidelity to the preferences of the majority, but rather the joint and equal participation of citizens in the process of self-government." (163) They derive this argument by reference to various other sources defending JR, such as Ronald Dworkin's *Taking Rights Seriously* (1977) which argues that judicial decisions in civil cases should be determined by principle, not policy; (82–90); Joshua Cohen's "Deliberation and Democratic Legitimacy," (1997) which argues that the protection of rights is justified by the idea of autonomy and the common good, not by the consequences produced; Cécile Fabre's "A Philosophical Argument for a Bill of Rights" (2000) which argues that constitutional rights should be enforced by the judiciary because they are moral rights against the state, and the state cannot bear the responsibility for respecting limits imposed against itself, not because the judiciary is more likely to protect these rights; and Fabre's "Constitutionalising Social Rights" (1998), which argues that any consequentialist argument for protecting constitutional rights must ultimately appeal to non-consequentialist justifications. Kaufman and Runnels (2016) touch on a similar idea to what is defended here, and derive it from existing sources defending JR. The conception of democracy offered here and used to defend JR is an elaboration on the idea expressed in the sources above.

A major problem with arguments against JR like these of Waldron and jurists like Scalia is their foundation in inadequate conceptions of democracy. These tend to define democracy as institutional outputs, or the satisfaction of the preferences of a majority of eligible citizens. All institutionally focused conceptions of democracy share the problems of either a) having a limited account of how power is distributed beyond the institutional arrangements, or b) having little to no account of preference formation. These conceptions of democracy thus tend to have difficulty distinguishing between elected oligarchies and democracies—here especially I point to Schumpeter (2008). Indeed, Schumpeter's definition of democracy is indistinguishable from an elected oligarchy; there is no distinction between the two as far as this theory is concerned. Some (e.g. Dahl 1998, 85-86) will attempt to remedy this problem by adding requirements about the extent of the franchise, the openness of channels of influence to all, and the robust maintenance of the electoral connection. There is nothing objectionable about these requirements. But my task here will be to remedy those problems by focusing on the pre-institutional commitments of democracy.

Of the major conceptions of democracy, none deals adequately with the reciprocal relationship between preferences and governance. There is little account of whose preferences are represented, and how those preferences get formed—if preferences are formed and controlled by a tiny minority, then this is hardly consistent with democracy as a process of self-government, and falls into the same problems as Schumpeter's theory and its inability to distinguish meaningfully between arrangements in which power is diffuse and equally distributed, and in which power is firmly entrenched with an oligarchic few.

We need an account of democracy, and of judicial review's role in it, that focuses on how power is distributed rather than the outputs that institutions produce. Democratic institutional arrangements are too numerous to review here, and many variants of democracy focus on how decisions are made procedurally, who is represented and how, and the goals that a democracy is intended to achieve; the emphases that it places on the values of its decisions. This account is pre-institutional; it develops the idea of political equality, a feature that Dahl (1998) claimed that all democracies assume pre-institutionally. By focusing on this pre-institutional requirement, I will elaborate the concept that Dahl lays down, and discuss its implications for institutional arrangements, especially judicial review, which is the focus of this piece. But one should keep in mind that, like any theoretical elaboration worth its salt, the ideas laid down here have powerful implications for real-world institutions' organizations and decision-making.

This account is pre-institutional; it develops the idea laid down by Dahl (e.g. 1998) of political equality, a feature that all democracies assume pre-institutionally. By focusing on this pre-institutional requirement, I will elaborate the concept that Dahl lays down, and discuss its implications for institutional arrangements, especially judicial review, which is the focus of this piece. But one should keep in mind that, like any theoretical elaboration worth its salt, the ideas laid down here will have powerful implications for how real-world institutions are organized and how they make decisions.

This argument is rooted in the so-called "counter-majoritarian difficulty" (Bickel 1986).[19] The oft-cited problem is that the Court's decisions have profound effects on lawmaking, but that this influence is not politically accountable to the people. If the

[19] "[J]udicial review is a counter-majoritarian force in our system…[W]hen the Supreme Court declares unconstitutional a legislative act…it thwarts the will of representatives of the actual people of the here and now…" (Bickel 1986, 16-17)

executive branch influences the court, making its decision bend in its ideological direction, then this difficulty is mitigated. It may mean that the Court only stands in the government's way when it is most important; this general pattern of deference is more compatible with a conception of democracy that rests on electoral outcomes and institutional output.

2. Power

In this section, I will briefly define the three dimensions of power to which I refer when arguing that democracy requires equal distribution of power. The first dimension is compulsion: A has power over B if A can get B to do something (or not to do something) that B would otherwise not do, or would otherwise do (Dahl 1957; Polsby 1963).

The second dimension involves agenda setting: A has power over B if A can influence the range of options that are available to B, from which B may choose (Bachrach and Baratz 1962).

The third dimension is identity and preference construction: A has power over B if A can influence how B conceives of himself and his social status (Lukes 1974). This is the power over a person's preferences, even to the point of control over his identity. A has power over B if A can alter how B constructs his preferences, especially with respect to the two moral powers: one's sense of justice and one's conception of the good (Rawls 1993; 2005). To be able to alter these is the power to make a person do something by changing what he wants to do. It is not exactly persuasion—it is the power to cause B to choose something because of how B conceives of himself and constructs his preferences.

Power here involves the resolution of issues of common concern—questions that might be resolved in a political forum, but the power to do this is conditional on the power to control and define oneself in a private forum. The thrust of the argument is that in order to maintain an equal distribution of all these dimensions of power, it is necessary to remove some issues from the scope of public concern, or to require their resolution in ways that the public might not decide by aggregating preferences. JR can help to accomplish this.

First Dimension

As to the first dimension, I refer to an equal power to determine whether public policy will embody policy X rather than policy Y. A person has an equal power if his will as to which policy that the public will is directed to is weighted equally with all others. This dimension of power is most closely related to the one-person-one-vote principle. In a representative, rather than direct, democracy, a person invests his or her power in a politician by voting for him or her, and this power affects politicians in office between elections by providing them an incentive to produce policies that will attract votes. Even if a person's preferred candidate or policy is not chosen, this is only because the superior power of a larger number of citizens selected a different option.

Voting does not fully capture this dimension; members of "sticky minorities", as Pettit (2012, 211-213) calls them, may have voting power ostensibly equal to anyone else, but an elected official with a stable majority supporting him may correctly feel that dissenters have no power over him, and can be safely ignored or made to bear the costs of policies that benefit the majority. Such sticky minorities cannot be considered to have

equal power, even though their votes count as much as the votes of anyone else. Other institutional mechanisms may be needed to ensure that power is not effectively distributed away from them, such as robust rights protections that can be pursued through courts, perhaps, or some higher institutional authority. Both Pettit (1997, Ch. 6) and Dworkin (1996; 1998) agree on this point: that one of the essential features of a democracy is that the minority party must have the ability to transform itself into a majority coalition. Methods of equalizing power are essential to democratic government, because if not, then sticky minorities have decreased power to participate in their own government. [20]

Second Dimension

"The definition of the alternatives is the supreme instrument of power." (Schattschneider 1960, 68)

The second dimension is similar to the first in that the issues that come up for public debate and resolution should generally correspond with the public's collective will. An agenda is a set of issues constructed in a hierarchy of importance at some point in time. In political terms: a general set of political controversies that will be viewed at any point in time as falling within the range of legitimate concern and meriting the attention of the polity. (Cobb and Elder 1972; 1983)

Cobb and Elder define an issue as a conflict between two or more identifiable groups over procedural or substantive matters relating to the distribution of positions or resources. In other words, an issue is whatever is in contention, (Lang and Lang, 1981)

[20] Dworkin's (1996) conception of democracy is that "the citizens of a political community govern themselves, in a special but valuable sense of self-government, when political action is appropriately seen as collective action by a partnership in which all citizens participate as free and equal partners, rather than as a contest for political power between groups of citizens." (1998, 453)

and the conflict over an issue drives its place on the public agenda. (Dearing and Rogers 1996, 2) Some issues, though, don't have clear proponent and opponent parties (like environment, drug abuse, etc.), and some issues have conflict between discrete groups, but do not get on the public agenda. Many issues require exposure through mass media coverage to get on the agenda; so, issues as defined here must have received that media coverage.

"Every social system must have an agenda if it is to prioritize the problems facing it, so that it can decide where to start work." (*Ibid*. at 1) This is not to say that public decisions will produce the "best" agenda, one that corresponds with some external normative standard, but as a descriptive democratic matter, power to set the agenda is simply one dimension of power that must be equalized in order that a polity might be democratic. "The agenda-setting process is an ongoing competition among issue proponents to gain the attention of media professionals, the public, and policy elites." (*Ibid*. at 1-2) This offers explanation of why info about some issues, and not others, are available to the public in a democracy. "The study of agenda-setting is the study of social change and social stability." (*Ibid*. at 2)

Individuals and groups vie attention to be given to an issue, help to determine the position of an issue on the public agenda, often at the cost of other issues: often, but not always, a zero-sum competition. Issues can vault up to the top of the agenda due to news coverage and the apparent urgency of the issue, but whether it stays on the top is determined by either a) competition from other issues, or b) new information generated by proponents to maintain its newsworthiness. "Exposure through the mass media allows a social problem to be transformed into a public issue." (*Ibid*. at 4)

Bachrachand and Baratz (1962) inaugurate the study of this second dimension of power with their critique of the conceptions of power at work in sociology and political science. Their central thesis is that power has two faces. The first face of power is described above—compulsion—but political scientists had been preoccupied with the exercise of power, not the sources. (948) Power was "participation in decision-making," analyzed in a series of concrete decisions.

Defects with this approach included that it does not account for the ability to control the scope of decision-making to "safe" issues (948), those that a group with agenda-setting power had incentive to keep from the decision-making body because they fear the choices that they might make. But there was unjustified certainty that power consists only in key decisions and how they are made.

They write, "Of course power is exercised when A participates in the making of decisions that affect B. But power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A. To the extent that A succeeds in doing this, B is prevented, for all practical purposes, from bringing to the fore any issues that might in their resolution be seriously detrimental to A's set of preferences[.]" (948)

This is the essence of the power of agenda-control: the power to control what gets decided, rather than the resolution of any given issue. "…to the extent that a person or group-consciously or unconsciously-creates or reinforces barriers to the public airing of policy conflicts, the person or group has power." (949) The power lies in the possibility that there exists a group capable of preventing contests from arising on issues

of importance to it. The power of agenda setting involves what gets decided and what does not. A majority of some group may prefer policy B over policy A, but if an agenda-control agency wishes to maintain policy B, they can do so through the power to keep the choice between them off the agenda. Then, the major party's preferences remain dormant.

The power of agenda setting is of signal importance in a democracy. Such a power allows that the preferences of a group, even a minor group, can govern over the countervailing preferences of another, larger (even majority) group. This is, of course, antithetical to democratic government: if there is a choice on which a majority of citizens can agree, say the choice of policy B over policy A, then democratic government requires that policy B be instantiated and policy A be left behind. The account of democracy proposed here takes this kind of power as critically important, because deciding to decide can be as important as the substantive decisions themselves.

Take the accounts of the agenda-setting power of parties in Cox and McCubbins (2005): the power of the majority power in the House of Representatives takes the form of committee controls which keep off the House floor bills on which a major party might get "rolled". A "roll" refers to a situation in which the minor party, joined by some members of the major party, is able to vote a bill through which is against the wishes of a majority of the majority party." (Kindle Locations 449-452)

Cox and McCubbins' theory holds that the power of parties, at least in the U.S. House, consists in negative and positive agenda control. They write, "…the central issue is the majority party's ability to control the legislative agenda, defined as the set of bills considered and voted on the floor." This consists in two forms: "Positive agenda power

is the ability to push bills through the legislative process to a final-passage vote on the floor. Negative agenda power is the ability to block bills from reaching a final passage vote on the floor." (Kindle Locations 506-508)

Notice that the power of parties in this characterization is not the power to dictate how members will vote on the floor. It is whether an issue reaches the floor or not. "As a specific benchmark, we claim that officeholders are expected never to push bills that would pass despite the opposition of a majority of their party." (Kindle Locations 671-672) This hypothesis finds support in Cox and McCubbins empirical analysis. And this highlights the importance of this second dimension of power: when the power to control the first dimension is limited, the second can be a useful and sufficient replacement. That is, this majority of the majority (which most often constitutes a minority of the whose) is the controlling power in the House due to the rules which grant agenda-setting power to certain committees like Rules, and the control over that committee belongs to a minority of the whole.

The power to prevent "rolls" means that bills that a majority of the whole might prefer will not reach the floor, and will not become law. This power over the agenda is critically important, because it involves the preconditions for the majority to exercise its power. Cox and McCubbins show that the agenda-setting power of the House concentrates in a minority's hands, and that this power involves a degree of control over decisions disproportionate to the power of other Representatives.

If a minor party controls the agenda, then their power over policy and decisions is vastly greater than the power of those outside this minor party, even if everyone's vote is ostensibly and otherwise equal. The power to control the agenda is the power to frustrate

the majority, to sap the majority's ability to exercise their own power. This is a separate kind of power because it involves not just the ability to compel the choice between alternatives, but sets the preconditions for such choices, and the order in which they are made, if at all. And as the second dimension sets the preconditions for the exercise of the first, so the third dimension sets the preconditions for the exercise of the first two dimensions.

For the same reasons as the previous section, guaranteeing the franchise is not sufficient to equalize control over the agenda. Sticky minorities may be effectively dominated, even with the franchise. Issues of most pressing concern for some may be marginalized by many others' interest in keeping the issue off the public agenda, either in public discourse or in legislatures. For example, one effective way to reduce the power of sticky minority groups is to gerrymander their power into packed or cracked districts that dilute or overly concentrate their influence into a small area. JR is one possible mechanism to prevent such an institutional method of violating the idea of the equal distribution of power.

Third Dimension

This is the power to affect preferences and identity. This type of power is often difficult to track: it relies on counterfactuals that are difficult to access. Further, it is difficult to conceive of how power can exist without a wielder; theories like Foucault's seem to refer to power as though it were pervasive, yet with no agent to employ it.[21] I

[21] It may be that there are in fact four dimensions to power, but I will proceed as though there are three. Lukes (1974) defines the third dimensions of power as B being willing to do something that A wants B to do. This power can be exerted even if B consciously wants to do what A wants B to do—if B acts contrary to her objective, real interests, then power is being exercised against B. This is a dimension of power in

believe that it is better to think of such influences as forces generated by social conventions and structures, which individuals may employ as power in order to affect others. The idea here is that the power to form preferences and construct identities should be non-public as much as is feasible; the individual should be able to use cultural resources in the process of self-cultivation, but not be subjected to the power of others or of the community. If the individual's construction of preferences is subject to external forces, then this third dimension of power is unequally distributed, and some people empowered to rule over others in important ways.

The third dimension is not itself distributed—rather, the character of this third dimension leads to an unequal distribution of political power. Regarding the distribution of power on the third dimension, we might ask how this power is really *distributed*, since it seems to imply that the power should be held by each individual and not distributed to anyone else. So this power is not distributed equally but held by each one individually, and distributed minimally to others. That is, the power over oneself is distributed entirely to each respective individual, and as far as possible, not to anyone else. So it is an equal distribution of 100 percent to each respective person, and 0 to all others.

Moreover, the manipulation of power on this dimension will affect the distribution of power in the other two dimensions.

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which the desires and wants of B are being manipulated (Lukes 1974, 23). The possible fourth dimension (Digeser 1992) belongs to Foucault. Its contribution is that it does not take as presupposed the subjects of the other faces, the A and B parties. Individuals' identities are socially constructed, and can be historically described; it has to do with the construction of A's and B's.

Lukes lacks the emphasis that Foucault has on the self as the product of the powers of external actors and environments, and I do mean power to contain this element: the idea that a person must have power over oneself, power to create his or her own identity. Lukes (1974) is touching on something similar: A having power to shape what B wants, and how he constructs his preferences. Foucault adds that this power can inhere in environments and structures—a contention which is not directly relevant to our purposes here, as I will refer to concentrations of power in individuals' or group's hands, not in inanimate or conceptual objects. So for the purposes of this essay, Lukes and Foucault will be taken as referring to a dimension of power that involves the formation of an autonomous self with autonomous preferences.

To describe this dimension of power and its relationship to democracy, I will draw on the ideas that Martha Nussbaum has elaborated on the role of political emotions, and draw out the implications of this work for democratic government. Nussbaum's (2013) account of political emotions focuses on their role in promoting and maintaining just institutions; I will shift the focus slightly to the role of emotions in constituting and maintaining a democratic polity. So I will focus less on how emotions maintain justice than how emotions maintain a polity's character as democratic.

Nussbaum's account of emotions makes two points helpful for our purposes: first, that certain emotions are essential to maintaining just norms and institutions, and second, that elites play an important role in cultivating public emotions which can either reinforce or undercut the public moods that sustain those norms and institutions. I will argue, by extension, that these emotions are also essential to maintaining democratic institutions (democracy is a component of justice) and to maintaining a democratic ethos in a polity.

Nussbaum writes, "…one of Martin Luther King's great achievements was to promote this emotional transformation in his audience. If educators can portray the denigrated group as part of a 'we' that suffered together in the past and is working together for a future of justice, this makes it far more difficult to continue to see the other as a contaminating and excluded outsider." (2013, 211) This feeds into my idea that democracy consists in part in the construction of preferences—and the efforts to influence such construction are more democratic than others, that is, King's was more democratic than Thurmond's, which sought to keep a group in submission. Every one must have the power to create his own preferences and identity, but the efforts of some to influence public emotion leave more room for self-creation than the efforts of others.

King's sought emotions were more democratic than Strom Thurmond's, or George Wallace's, for example, mainly because their aims were to exclude black Americans from the "'we' that suffered together in the past and [was] working together for a future of justice…" (*Ibid*).

The consequence of this principle is t hat a society must take care not to stoke resentment and disgust against individuals or groups absent some compelling moral reason to do so. Nussbaum writes, "One could…imagine an argument that it is always unwise to whip up disgust in public life, given the specific tendencies of that emotion to lead to the stigmatization and subordination of vulnerable groups." (2013, 212) We may interpret this to mean that identity groups should be free from events and attitudes that stoke disgust, whereas different rules may apply to groups based on conviction, whose attitudes deserve strong disapprobation from the general public because of their tendencies to stoke disgust and violence against others (one obvious and useful example of such a group whose ostracizing may be permissible and appropriate would be the Nazis).

Nussbaum also provides several examples of structures that promote dehumanization and oppression of vulnerable groups. "What structures are pernicious?" she writes. The three conditions under which people tend to dehumanize one another come from experimental psychological research. "First, people behave badly when they are not held personally accountable. People act much worse under shelter of anonymity, as parts of a faceless mass, than they do when they are watched and made accountable as individuals. (2010, 43)

The second condition for dehumanization is the lack of a critical voice in a group. "Asch's subjects went along with the erroneous judgment when all the other people whom they took to be fellow experimental subjects (and who were really working for the experimenter) concurred in error; but if even one dissenter said something different, they were freed to follow their own perception and judgment." (43-44)

Third, people behave badly when the human beings over whom they have power are dehumanized and de-individualized—that is, when they are portrayed in ways that reduce them to vermin, or caricatures, ways that erase their full humanity. For example, people behave much worse when the "other" is portrayed as like an animal, or as bearing only a number rather than a name. (44)

All three of these conditions speak to the predicates for the construction of preferences in democratic ways and under democratic conditions. There are two angles to this dimension of power: first, the conditions under which individuals and groups create their preferences must—as much as possible—be arranged to prevent dehumanization and oppression of vulnerable groups (all people, really, but vulnerable groups are especially at risk). Institutional conditions foster the perception of people as individuals and as members of groups. As much as possible, a democratic society arranges itself to prevent fostering dehumanized conceptions of other citizens' identities. Second, institutions must be arranged as much as possible to allow all people to create their identities and preferences freely. That is, as much as possible, without unwarranted, fearsome stigmas attached to lifestyles and identities which prompt incompatibility between one's conception of oneself as a "good person" and the desire to recognize oneself as a member of a group which happens to be composed of social outcasts. One

example would be men who might otherwise have become aware and open about their homosexuality, compelled to hide it because they could not reconcile their identity as a non-deviant, or a good person in general, with a shameful title like homosexual. "We probably cannot produce people who are firm against every manipulation, but we can produce a social culture that is itself a powerful surrounding 'situation,' strengthening the tendencies that militate against stigmatization and domination." (Nussbaum 2010, 44)

Take, for example, the problem of the tamed housewife (e.g. Sen 1987; 1999; Roemer 1998, 20). This is a heuristic developed by Sen as a heuristic for the development of a theory of egalitarian distribution. One problem with theories like welfarism (see Roemer 1996, 91) is that such theories give too few resources to the tamed housewife, a woman who has learned to be happy with abbreviated resources and opportunities, and who voluntarily distributes away to. e.g., her husband, sons, father, brothers, etc. the resources and opportunities that come her way. Sen's conception of this hypothetical woman highlights the problems with theories of distribution that count on each individual as a rationally self-interested, full agent. She is submissive to the will of the men in her life. She genuinely prefers pleasing them, which involves submission and imitation; but this is not just a matter of suppressing her real desires. She is submissive to the extent that she seems to genuinely prefer to imitate and satisfy her husband's wishes. She has no power along the third dimension; it has been distributed away to her husband. And as a result, so has her power along the first two dimensions; she votes and participates politically when, and in the ways, that satisfy her husband. Power in the third dimension affects power along the first two dimensions. The third dimension is influence over one's preferences, identity, and self-conception, especially with respect to the moral

powers. A non-democracy is marked by individuals' unequal ability to govern themselves, especially with regard to the development of the moral powers.

Here I draw together the conclusions of the three subsections on power. When I refer to an equal distribution of power, it means that an individual's power, equal among all others, to select among policy alternatives for a society: that individuals all have an equal power that their society select policy A rather than B or C. Second, I refer to an individual's power to make the decision-making agenda for their society reflect his or her intensity of concern; an equal power to set the agenda for selecting among alternatives. Finally, I refer to an equal power to construct one's preferences so that one may select autonomously among alternatives to govern the polity, and help to set the public agenda. The example of the tamed housewife shows why an individual's power to do this for oneself must be maintained for oneself to maintain the equal distribution of power. Democracy requires autonomous choice for individuals and groups, as far as possible.

These kinds of power operate as interconnected, and as predicates for one another. The third dimension informs the identities and preferences of persons and groups, preferences that must be created before one can use one's power to alter the world or people. The third dimensions acts as a predicate for the other kinds of power, because one cannot select from available options, or organize an agenda, without first creating an identity with preferences. Then, the second dimension acts as a predicate for the first, because as seen above, the agenda-setting power can prevent individuals or groups from acting on their will to change policy by preventing some choices from reaching a decision-making stage. Only after the first two dimensions have been exercised can one

use one's power on the first dimension, the power of compulsion over the choices in collective decision-making.

III. Democracy as Equality of Power

This section examines the interconnection between power and democracy. In order to examine this relation, I ask which conception of democracy can be derived from the values or decision procedures of different conceptions of justice. I assume here that justice provides the most acceptable criterion for choosing among conceptions of democracy, and that other competing considerations like stability can be addressed reasonably well in a just democratic system under conditions of moderate scarcity.

The larger the set of conceptions of justice examined, the less vulnerable the argument is to charges of parochialism. I will examine two conceptions: Rawls' justice as fairness and Pettit's neo-republican principles of justice and legitimacy. While the set examined includes a small number of conceptions of justice, an argument examining these two conceptions at least suggests that the conception of democracy that I defend is consistent with two leading conceptions of justice that are both entirely distinct and developed from quite different conceptual foundations.

Rawls' Contractarianism

This section explores the conception of democracy underlying justice as fairness. A complete account of this topic will not be possible in the limited space here—instead, I will endeavor to show the congruence between justice as fairness and the conception of

democracy set out above. Here I hope only to show that this conception of democracy as power follows naturally from Rawls' theory.

The core of this argument draws on the reasoning undergirding the choice of principles—particularly the liberty principle—in the original position. Rawls argues for a maximin decision rule in the original position; this derives from the five requirements that any system of justice must have, five constraints on the concept of right.

The requirements that a system of justice must have include first, generality: it should be possible to formulate the principles without reference to proper names or "rigged definite descriptions." (113) This prevents the principles from being rigged in favor of special interests because no one knows how to do so in the OP given information constraints of the veil of ignorance. The second requirement is universality: principles must hold for everyone by virtue of their being moral persons. Principles must be construed so that everyone can reasonably be expected to comply with them, and the consequences of the principles judged in this light. It is not acceptable to have one set of principles for one person but a different set for everyone else. (114) The third requirement is publicity: parties assume that they are choosing principles for a public conception of justice; they suppose that everyone will know about these principles all that he would know if their acceptance were the result of a real-world agreement. Rawls writes, "The point of the publicity condition is to have the parties evaluate conceptions of justice as publicly acknowledged and fully effective moral constitutions of social life." (115) Fourth is that the system of justice must impose order on conflicting claims— ideally, a transitive ordering, and this order must be the result of the proper moral considerations and aspects of persons, not e.g. their ability to win in a trial by combat. (116)

Last and most important for our purposes is finality: there is no higher standard to which the parties who choose these principles can appeal; the choice of principles is final and the results are just, whatever they happen to be. The choice of principles is final; there is no appeal that a person can make over the principles chosen in the appropriate conditions. "The complete scheme is final in that when the course of practical reasoning it defines has reached its conclusion, the question is settled. The claims of existing social arrangements and of self-interest have been duly allowed for. We cannot at the end count them a second time because we do not like the result." (117)

This means that a party in the original position must choose principles of justice to regulate the basic structure of his society, keeping in mind that wherever her place in the social order, and the benefits and burdens allocated to her, she must be able to accept this outcome as reasonable and just. To find that she occupies a grievously low social stratum—say, that she is a slave, or untouchable, or tamed housewife—would strain her commitment to the principles chosen in the OP to the breaking point.

Thus the principles chosen must foreclose any such outcomes. Rawls refers to this problem as the strains of commitment, and writes, "Along with other considerations, [parties in the OP] count the strains of commitment…Thus in assessing conceptions of justice the persons in the original position are to assume that the one they adopt will be strictly complied with. The consequences of their agreement are to be worked out on this basis." (126) Parties in the OP select principles on the basis that others are generally able and willing to comply with them. And whatever place a person occupies in the social, economic, and political order, she must accept it as just, and it must not overburden her ability to accept the chosen arrangement as just. "Thus they consider the strains of

commitment. They cannot enter into agreements that may have consequences they cannot accept. They will avoid those that they can adhere to only with great difficulty. Since the original agreement is final and made in perpetuity, there is no second chance. In view of the serious nature of the possible consequences, the question of the burden of commitment is especially acute. A person is choosing once and for all the standards which are to govern his life prospects. Moreover, when we enter an agreement, we must be able to honor it even should the worst possibilities prove to be the case…. Thus the parties must weigh with care whether they will be able to stick by their commitment in all circumstances." (153) This means that a party in the OP must pay special attention to the worst possible outcomes of the chosen system of justice. It is rational, Rawls argues, to adopt a maximin decision rule as this rule is predicated on maximizing the benefits of the worst possible outcome. The worst outcomes, e.g. slavery, serfdom, complete subjugation, etc. are so dire that it is rational to choose principles that rule such outcomes out in advance. "In this respect the two principles of justice have a definite advantage. Not only do the parties protect their basic rights but they ensure themselves against the worst eventualities." (154)

The Maximin Decision Rule

There are three conditions under which a maximin approach is the proper decision rule, all of which are met in the OP. So first, we rehearse Rawls' arguments for the maximin decision rule, and then move to the role of this rule in the regulation of power under the first principle of justice.

1) The first reason is what Rawls calls very considerable normal risk-aversion. (1974, 143) Parties in the OP have no basis for assigning probabilities that they will occupy any particular social positions. They have no method to assess the likelihood that they will do well or badly, or how well or how badly. Given that, it is more rational to take seriously the possibility of being assigned a terrible position than a highly advantaged position. For one thing, the worst outcomes would prevent a person from pursuing any end to which she might devote her life. The suffering entailed in a worst-case scenario is apocalyptically bad, and should be taken with the utmost seriousness. For another, the best outcomes involve diminishing returns as one's advantage increases. Being a millionaire or a billionaire is less important to the fundamental matters of pursuing one's ends than the outcomes of being a slave and not being a slave. For these reasons, not all gains and benefits should be assigned the same value, and a strategy of minimizing risk is preferable to a purely risk-neutral or strictly rational approach.

2) The second reason is that parties in the OP are more concerned with the worst possible outcomes than the best possible outcomes.

This of course follows from the rational risk aversion described in the last section. The parties in the OP would rationally decide that the worst outcomes deserve more weight than the best, because the awfulness of the worst outcomes is worse than the advantages of the best outcomes with respect to one's ability to pursue a rational plan of life. Therefore, it is clear that parties in the OP would be more concerned with the chance of getting a highly disfavored position than the chance of being in a highly advantaged position. Since the impact of the parties' choice is vast, and the choice of principles cannot be revisited once selected, and the worst outcomes are highly

oppressive, the potential costs of doing badly would weigh more heavily for any rational person in the original position choice than the chances of doing extremely well, especially given that maximin logic permits the parties to choose principles that allow substantial inequalities in favor of the better-endowed (Bear in mind that personal attitudes toward risk are not relevant in the original position—the concern with the worst possible outcomes is a product of the awareness that these positions are so bad that extra attention to preventing those outcomes is purely rational, not risk averse in the sense that a person's attitudes on this point, which are influenced by natural and social endowments which are irrelevant from the moral point of view, would be important while reasoning in the OP. Effort to prevent the worst possible outcomes is not the product of arbitrary personal attitudes toward risk, but of the rational awareness that such outcomes are so bad that they merit extra attention to prevent).

3) The strains of commitment: a party in the OP must not agree to any principles that would strain her ability to accept her circumstances under those principles to the breaking point. Because the choice of principles of justice is final, there can be no appeal to reverse the decision in the OP once made. A person then must choose principles that give an acceptable outcome, no matter how bad it ends up being. This means that the principles chosen would produce a worst-possible outcome still acceptable to the people so situated. Among the greatest strains would occur when a party must accept an invasion of basic rights so that another person or group may benefit. This means that another person would live and act entirely at the mercy of another, wholly dominated and without power over her own life and its prospects. Any acceptable theory of justice must rule out such a possibility because the parties in the OP would not accept the possibility that the

principles they choose could allow such unacceptable outcomes. Once again, the rational focus on how bad outcomes can be tends in favor of the maximin criterion.[22]

The Liberty Principle

The parties in the original position would select a principle to protect their liberties of political participation because the failure to do so, and the risk that one would become a fully dominated member of a society (a slave), would be too great to countenance. The principles chosen must foreclose the possibility that any party would be subject to the control of another because that possibility would strain one's commitment to the principles of justice beyond the breaking point. A person would not agree to any principles that might leave him at the mercy of other persons. The basis of the liberty principle, which undergirds this requirement, lies in the decision process in the OP: the maximin decision rule. The choice of the liberty principle, and its priority to the second principle and its concern with distribution of goods and opportunities, is the solution to this problem of choice under uncertainty in the OP according to the maximin rule. By choosing to secure for themselves a broad, equal scheme of basic liberties, "[The parties]

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[22] Rawls (1974) also gives as a reason for the maximin criterion that it relies on less demanding information requirements than such as an average utility criterion. The maximin criterion is more precise and measurable in the public's attention compared to the average utility criterion, which is notoriously imprecise due to the difficulty in measuring preference satisfaction. By contrast, the prospects of the least advantaged are comparably easy to detect and measure. Moreover, this same paper offers yet another reason beyond the three stated above and the one detailed in this footnote. Rawls notes that none of these reasons is decisive alone. But one consideration that is decisive is the respect for persons as free and equal. An approach that respects rights only in order to achieve some other goal, like maximizing average utility, fails to express respect for the equality of persons. "…[T]he aspirations of free and equal personality point directly to the maximin criterion," (144) because this criterion has as its basis respect for individuals as free and equal citizens because it is founded on the choice of persons who seek to advance their own fundamental ends as free equals, not on the maximization of some independent criterion which tends to imply that the value of persons is in the end of utility generation rather than as ends in themselves. Rawls argues that the two principles are likely to generate their own support in this way, because they embody a public commitment to respecting each person as an equal moral person: "they publicly express men's respect for each other" (TJ, 156).

run no chance of having to acquiesce in a loss of freedom over the course of their life for the sake of a greater good enjoyed by others, an undertaking that in actual circumstances they might not be able to keep." (Ibid.) The finality condition leads to the strains of commitment, which leads to the choice of the maximin rule as the decision procedure in the OP, which in turn leads to the adoption of the liberty principle, which excludes outcomes so grievous that they would strain a person's ability to accept the principles as just. And, the maximin rule also informs the content of the liberty principle, a subject to which we now turn.

Power is Instrumental to Protecting Liberty

The liberty principle is meant to protect the parties in the OP from outcomes so bad that they would test the strains of commitment to the principles of justice. The choice in the OP has the formal requirement of finality (TJ 116-117): the principles, once chosen, must be acceptable as the last word on justice. If the principles permit social positions that we cannot accept as just, then the principles that we have chosen overtax our ability to commit: the chosen principles then cannot meet the strains of commitment. Any principles chosen in the OP must avoid imposing any such strains.

Parties in the OP take seriously the requirement that the principles chosen must address the strains of commitment effectively. The greatest strain on commitment, Rawls argues, is the case in which my liberty interests are invaded (e.g. enslavement) so that others can benefit—thus the maximin rule for the OP's choice under uncertainty. The first principle completely rules out interference with liberty interests. It is thus reasonable to judge that justice as fairness provides the most satisfactory minimum

protections for liberty interests. Those outcomes (e.g. slavery, serfdom, being used as organ farms) tend to have in common the subjection of the individual to the uncontrolled power of another.

This argument tends to treat power and liberty as closely related, but Rawls himself tends to do this as well. It is not too much to say, I think, that the outcomes after the OP that would strain commitment to the principles of justice to the breaking point, tend to have in common a dearth of liberty and a dearth of power over oneself and one's polity. Therefore, the parties in the OP would choose the liberty principle to foreclose the options that would strain commitment to the breaking point, maximizing the benefits of the worst possible outcomes. Part of this commitment to a broad scheme of equal liberties is the preservation of one's power over oneself and over the disposition of questions of common concern. Subjection to another's will is a hallmark of an outcome that would violate the strains of commitment. Thus it seems reasonable to interpret the liberty principle as guaranteeing an extent of power over oneself and over political decisions that would rule out any such subjection. An equal distribution of this power forecloses all avenues for domination, and adequately serves the maximin criterion.

Power and Non-Domination

Non-domination requires an even distribution of power on all three dimensions.

Pettit's theory of liberty as non-domination was developed as a supplement and counterpart to liberal conceptions of freedom, which tended to hold that freedom consists in the absence of restraint. Pettit's theory revives the Roman conception of the dichotomy between the *liber* and the *servus*, which defines a *liber*, or free man, in

opposition to the *servus*: to be free is not to be a slave. Pettit then develops a conception of the meaning of a slave—to be a slave is to be at the act and to live at the pleasure of some other party. It is to be subject to the arbitrary will of another; in other words, to be a slave is to be dominated, and to be free is not to be dominated.

Then Pettit develops a conception of domination. Domination means the uncontrolled power of one party to interfere with the choices of another; it is inimical to freedom. This involves a concentration of power in some hands at the expense of the power of others. Domination forms a relationship between two parties as ruler and ruled; without domination, without uncontrolled power, but with reciprocally controlled power held in many hands, democracy is possible. Democracy exists with freedom at the opposite end of a continuum from domination. This forms a useful connection between power, democracy, and a value often closely aligned with democracy: freedom. With this connection, it is easy to claim that democracy is intimately connected with freedom, and that an increase in one corresponds to an increase in the other.

So domination is the uncontrolled power to interfere with another party's choices, and freedom consists in the absence of such domination. From this core concept, Pettit develops conceptions of legitimacy and justice, which describe the appropriate relationship between the state and civil society, and the relationship among elements of civil society, respectively. In brief, legitimacy consists in the absence of domination of the people by the state, and justice consists in the absence of domination among the people. The republican idea of justice involves absence of domination among social groups; it is a horizontal relationship, between people in civil society, free from

dominating powers (Pettit 2012, Ch. 2). Legitimacy (152-153), by contrast, is the absence of domination vertically, between a government and the society it governs.

By legitimacy, we then understand a state that is controlled and checked such that its power over the whole people is not arbitrary, but controlled by the people over whom it is wielded. For example, the characteristics of an illegitimate government would include the absence of electoral accountability, the concentration of all powers in one person or institution, and the absence of loci in the government in which popular influence can be brought to bear to alter the direction of policy—that is, a government that operates in secret, away from the power of non-government agencies and agents who might alter policy in line with public preferences. Illegitimacy consists in the presence of domination over the people by the government, which has occurred in the cases of absolute, hereditary monarchies and colonialism, for example.

The ways to ensure legitimacy are three-fold: the mixed constitution, the contestatory citizenry, and the tough-luck test in elections. A mixed constitution, that is, one with vigorous institutions and separated powers, reduces domination because it makes the state risk-averse. In any government action which may oppress the people, if the government is divided into agencies which can gain advantage over one another by currying public support against another branch of the government, then one or more agencies has incentive to resist the oppression of the other(s) because by doing so, the branch that seeks to protect the people may gain their favor, and increase its power relative to the other branches. The separation of powers makes concerted efforts to dominated the people hard to coordinate, and gives incentive to the other branches to deviate from such efforts. The mixed constitution decreases the probability that elites

will close ranks against the people, and increases probability that one department will respond against the others to the people's will. Its aim is to make government as a whole risk averse. And as a result, the *vox populi* does not come from one single department but as output of a complex process.

Moreover, the contestatory citizenry refers to a people whose attitudes and resources give them the willingness and the power to contest government action at various loci—that is, in courts, in government agencies, and through the electoral connection. The government is responsive to citizens' desires, and the people know that they can influence the direction of government policy. The people are ready and willing to impose their will on gov't to ensure that they get what they want from government. "…[I]f the interference of the state is not under the control of any single agency, as the mixed constitution more or less guarantees, and if it is itself subject to the control of those on whom it is imposed, as a contestatory citizenry would ideally ensure, then it will not be dominating." (Pettit 2012, 23)

Elections are bound to produce people who lose in political contests. Are the people who lose such elections dominated? No, but only as long as their defeat meets the "tough-luck test". This means that whatever direction the people impose on the government, it does so such that those who lose out in the democratic process see their failure as the result of tough luck rather than subjection to an alien will. If it were not tough luck, but powerful entities that suppress electoral outcomes, then there would be dominated segments of society, which would be a violation of legitimacy and justice.

Justice is the absence of domination among segments of a society. Pettit describes his "eyeball test", which refers to a person's ability to present oneself in public

without shame, and without feeling like a second-class citizen. The key question is whether one can walk down the street and meet another's eyes, knowing that you are meeting an equal, and that you are owed respect (*Ibid.* at 84-85). The eyeball test refers to being treated with dignity by even those with a higher station in society.

Violations of this test would include the American south during and before Jim Crow, and caste or feudal societies in general. By local standards, each citizen ought to be able to look all others in the eye without need for fear or deference.

We have seen above that domination refers to the extent of power, and whether it is controlled or uncontrolled by the people over whom it is wielded. This means that power not be concentrated in a small group, or in one set of hands. The advantage of Pettit's conceptions of freedom, justice, and legitimacy is that he makes very clear what the relationship of power to these three concepts is. All three of these political values demand diffused power, which can readily be checked by powers from different sources.

Freedom consists in both justice and legitimacy. Freedom is non-domination, and justice and legitimacy indicate that domination is absent both vertically (between state and government), and horizontally (among the people). Democracy is a byproduct of both legitimacy and justice. Since freedom is the absence of domination, and domination consists in unchecked concentrations of power, then freedom indicates that in a society, power is diffuse and ready to be contested from any part of the society. Pettit makes clear, through his requirements that the government be elected and checked by a contestatory citizenry, that the legitimate society is democratic. Pettit's conceptions require that power be diffuse and well checked, which is consistent with the theory of democracy laid out in this paper.

A legitimate and just society, one entirely free from domination between any parties, is able to govern itself both individually and collectively. Distributing power equally among a people means that the people are able to impose direction on the government, and rightly believe that their combined action determines the direction of public policy. This is so because if the government failed to be responsive to popular efforts to impose direction, then it would indicate that power had been distributed vastly unequally—from the people entirely to the government. This would indicate a lack of elections, closed sites for contestation, and likely that elites had succeeded in closing ranks against the people. Even if the people delegate their power to a government, some must remain to ensure non-domination.

This means that the government is legitimate, in Pettit's terms. This also means that there cannot be domination between individuals and social groups because everyone has power over themselves as well as power to direct change in the public square, which satisfies the republican understanding of justice. The absence of domination is especially important on matters involving the basic liberties[23], as they are the predicates for the exercise of the powers of self-government.

The connection between power, freedom, and democracy in republican theory re-casts the Court as a vital democratic institution: judicial review, according to republican theory, is essential to prevent anti-democratic concentrations of power that undermine freedom. This is especially important in the role of protecting constitutional liberties,

[23] The republican theory of liberty can be seen as a useful addendum to the liberty principle. It helps to clarify what the liberty principle requires: not just the absence of restraints but also the absence of domination. This theory of democracy unites the liberal and republican theories of liberty, and ties together Rawls and republican justice.

since those constitutional protections entrench the basic liberties that are the basic predicates for self-government and participation in the polity.

Pettit's and Rawls's theories converge here: they tend to see the requirements of democracy similarly. Since we have reached the same position from different theoretical foundations, we can be all the more confident that the justification of this conception of democracy is persuasive. Both theories include among the resources necessary in order to realize democracy an equality of power to affect political outcomes: Rawls, by requiring that power (as a constitutive element of protected liberties) would be distributed equally, and Pettit, by requiring that power be distributed equally so as to avoid domination among individuals, government, and social groups.

Power and Self-Government

This discussion of the three dimensions provides insights into the nature of an acceptable account of a just distribution of the power to participate in collective self-government, and the power to govern oneself individually. The powerless cannot do either, and people who have an unequal share of power are ruled over by those who have extra; the extent to which a distribution is unequal is the extent to which a polity is oligarchic rather than democratic.

The extent to which the necessary conditions of collective and individual self-government are interconnected is revealed by the analysis of the three dimensions of power. Recall the example of the tamed housewife: the power to govern oneself individually is presupposed in the power to govern collectively. Parties like the tamed housewife are governed by others, not self-governed, in the formation of their

preferences, and thus the preferences that they may bring to bear on public debate and decision-making are manufactured representations of others' wills. In order to participate meaningfully in collective self-government, one must construct one's preferences and identity such that one can form a will that one can bring to bear in contests over policy.

If persons cannot effectively govern themselves—perhaps because they are being effectively manipulated by a third party—then any apparently free political participation will in fact be a manufactured representation of some other will, not an instance of autonomous self-government. Preference formation permits and reinforces an individual's exercise of the first two (agenda-setting and compulsion), and those two also inform the development of preference formation.

Here I make the case for a connection between pathologies of preference formation and the kinds of concentration of power that judicial review may be useful to prevent. The connection between democracy and preference formation is the subject of this section. I argue here that the manipulation of preferences can damage democratic government in the following ways:

1) Demonizing vulnerable groups makes it easier to justify disenfranchisement.

2) Demonizing makes people hide their identities, such that membership in that group is smaller, and the group weaker, than it would otherwise be.

This also helps to keep some topics off the public agenda by making them taboo. A good example is the historical oppression of homosexuals, which took the form of marginalizing homosexuals from social life by making such behavior taboo. This made it such that men who would otherwise have identified themselves as homosexual did not

because it was impossible for them to square their identity as a decent person with their sexual urges—the internal monologue took the form of: I cant be a homosexual because I am a good person; therefore, these desires are to be repressed and shunned.

This kept the group small, and its interests off the public agenda, and was implemented in large measure by criminalization of homosexual behavior (which would later by rendered unconstitutional by the Supreme Court in *Lawrence v. Texas*). Such criminalization had these effects: disenfranchisement of gay people for committing crimes; rendering their identities as shameful and socially marginalized because it was identified as a crime, so the issue was difficult to bring to public attention due to its taboo status; these then feed into the self-curbing behavior discussed above.

In general, this dimension of power, self-cultivation, is a predicate for democracy because people must know, and have the freedom to decide, what their preferences are in order to act on them with political power. The ability to form a will over a set of preferences is a necessary condition for the exercise of the other kinds of power: compulsion and agenda setting. A useful way for one group to suppress opposition is to render opposition into a shameful act, one which decent people simply do not do. The use of shame can keep an opposition group small, and keep issues off the public agenda that might otherwise attract enough support to threaten the status quo

Pathological preferences create concentrations of power by limiting participation and encouraging marginalization and learned helplessness. As stated above, Nussbaum provides many examples of pathological preferences formed with the help of emotions like fear and disgust. These are often applied to small or otherwise vulnerable groups, like racial minorities, or women. These direct the preferences of an already powerful

group (a majority or a minority) to exclude others from public life. This exclusion takes the form of applying taboos to some actions (e.g. homosexuality, interracial relationships or simply general comingling). These taboos can do either or both of the following: 1) keep membership in the group small, and most of the populace unwilling to broach issues in public due to their shamefulness, or 2) keep those already in power from interacting with, or acting on behalf of, vulnerable peoples.

We can illustrate these ideas with general references to American historical behavior. On the one hand, groups like homosexuals were kept under heel by keeping their membership and organization minimal, and making the promotion of their civil rights taboo. On the other, racial minorities like black Americans were effectively excluded from public life by maintaining social taboos against forming any relationships other than either master-slave or employer-employee. By fostering emotions of disgust and fear, it became easy over time to ban black people from the polls, and keep them out of places of business. Disgust and fear allowed segregation, which in turn kept black Americans from being full participants in public life, equally able to exercise their share of political power (which was also unequal).

Also importantly, subjugation like these examples can often produce an attitude of learned helplessness, akin to the tamed housewife described above, which tends to keep vulnerable groups and their members in subjugated positions. The main point is that public attitudes which reflect emotional pathologies, like disgust for other individuals based on immutable and morally arbitrary characteristics, tend toward a) exclusion from public life, which renders these groups politically vulnerable because unequally able to

press their agenda in public life, and b) attitudes of learned helplessness or shameful concealing of their membership in these vulnerable groups.

Judicial review is not likely to change attitudes (though opinions like *Brown* and *Lawrence* may serve as rallying points for the organization and protection of marginalized groups), but it may help to fix the institutional results of such pathologies. The main argument in this paper is not that judicial review is a cure for the emotions that lead to unjust institutions; it is merely that, on this accounting of democracy, uses of judicial review that militate against the institutional results of pathological social emotions should not be termed undemocratic, as the institutionalization of such emotions is undemocratic itself due to its inhibiting individual and collective self-government.

Our identities and wills are often formed dialectically: in public debate and contest, our identities and preferences are continually constructed in opposition to those from competing perspectives. So the exercise of these three dimensions of power are mutually interconnected.

For this reason, accounts of democracy that fail to take stock of the formation of preferences, and how the franchise and the electoral connection can be manipulated by third-dimensional power, are necessarily incomplete. The particulars of how institutions can be arranged to prevent the formation of such skewed preferences are detailed elsewhere (e.g. Nussbaum 2010 Chs. 3, 8; Nussbaum 2013, Chs. 8-10), and I think somewhat beyond the purview of this argument. I mean here only to say that such pathologies can skew preferences, and democratic government, and that if JR helps to eliminate the policies and institutions that tend to produce such skewed outcomes, then it cannot be charged as anti-democratic.

As argued above, the three dimensions of power help us to conceive of the extent to which a person is collectively and individually self-governing. It also helps us to realize that these two, collective and individual self-government, are interdependent. Most other theories of democracy focus on institutions rather than power; or, if they focus on power, it is institutional power, or the power of the citizenry to control institutions. A nation may have a democratic system for those who share in power, but an oligarchic government for those who do not.

Institutional arrangements can then be assessed to determine how closely they approximate the necessary conditions of a form of democracy in which citizens are able to exercise equal power to realize their genuine preferences in political choice. Institutional arrangements that do not preserve an equal distribution of power can rightly be judged as possessing a veneer, rather than a robust foundation, of democracy. History furnishes many examples of nations with institutional arrangements that have the familiar trappings of democracy, like elections and the franchise, but be practically oligarchic with respect to the groups in sticky minorities[24], or electoral outcomes that are foregone conclusions because competition is eliminated, dissent suppressed, and voting manipulated either at the ballot box, or prior to that, at the level of electoral competition. Some examples, like Saddam Hussein's Iraq or present-day Russia, countries whose elections are clearly manipulated by the state (see e.g. Purdum 2003; Blank 2005)—involve obvious failures to realize an acceptable form of democracy. Other democracies, like the United States, may not have the egregious flaws of younger democracies, but nonetheless fall short of a democratic ideal. Democracy requires an equal diffusion of

[24] Sticky minorities must be sticky with respect to some quality that does not have to do with their convictions; i.e. it cannot be because their ideas are bad, or that they decide to hive themselves off for some reason; it must be some aspect of identity.

power; to the extent it is concentrated[25], a society is correspondingly less democratic. A satisfactory form of democracy thus requires not just access to participation, but equality as well.

Second, to the extent that persons are not allowed to be self-governing or self-cultivating in their personal lives, a society is less democratic. A robustly self-governing people is comprised of individuals free and encouraged to cultivate their own talents, preferences, lifestyles, and identities, both private and public. If individuals are unable to do so by way of deprivation to the necessary ideas, resources, time, or means in general, then their participation, even if formally allowed, is rendered less meaningful and powerful. This is to say that there are predicates for the development and use of individuals' power in public matters. If we conceive of a person's public power as consisting only in the equal value of her vote, and the formal guarantee that she is able to vote, we miss many matters that pertain to the real power of this vote. For example, for a vote to have much value, a person must possess the resources to analyze her options to ascertain which aligns best with her preferences; she must have the time to cast a ballot; she must be free from undue influences on her vote, like the threat of violence or privation should she vote in a way that displeases someone with power over her, etc. The idea that a person's vote is mathematically equal to all others, and that the access to the ballot is not formally impeded, is not sufficient to guarantee equal power. An individual must also be undominated by others by having the resources to escape coercion by others and to decide which choice she genuinely prefers.

[25] Some concentrations may be necessary, but must have powerful internal justifications, like minimum age restrictions, under the reasonable supposition that a child able to vote would be more or less an extension of his or her parents will, which would substantial extra weight to their preferences.

Power is less widely distributed, which is required by our definition of democracy, if individuals are subjected as second-class citizens (or worse).

This conception of democracy provides a basis for resolving potential tensions between elective representative institutions and democratic self-government. The institutional view of democracy, does not give a clear picture of how a legislature, for example, can be anti-democratic. If there is a higher law like a written constitution that is, like the American constitution, expressly a species of law superior to the ordinary positive law of legislatures, then the problem can be answered. As Hamilton pointed out, a constitution can have a higher democratic pedigree than a statute: a legislature can contravene the charter that creates it, which is anti-democratic on Hamilton's account of a basic charter contracted by the people as such as superior in democratic character to the statements of the people's representatives. But this only solves the problem by moving the problem one stage up in abstraction. A constitution can also be anti-democratic, but without this understanding of democracy, it is difficult to answer how. A constitution that instantiated an unelective despotism would hardly be democratic, even if it were enacted by popular vote. By the same token, a statute that concentrates power in a subset of the population similarly compromises democracy's commitments. Both statutes and constitutions can easily be anti-democratic if they concentrate power in a select few hands, and disenfranchise or disempower other groups. Institutions of the sort I am conceiving here would ensure broad distribution of the power to resolve questions of common concern to all adults.[26]

[26] Children ought to be excluded because it is safe to claim that they would be overly pliable to their parents' or guardians' will, allowing adults to arrogate undue power to themselves through their children whose actions they may be able to direct or control—notably, this again presents a problem in the third

The tension that I mean to describe exists when democratic institutions produce non-democratic outcomes. The institution-centered accounts have an internal tension: democracy consists in institutional forms but their outputs can be deeply undemocratic. There are ways to resolve or mitigate this tension, like adding more characteristics that constitute democracy, like the idea that legislatures must respect the rule of law, or some baseline level of liberty, or political equality among adults.

Democracy is committed to a broad and even distribution. We should aim to maximize the degree to which all are real participants in the process of self-government. This is true of power both to influence public affairs and also to conduct one's own private life (but note that there is a limit to these powers, especially to the power of self-determination; also, as regards the power over public affairs, it may not be possible to increase one person's power without decreasing others, in which case the Pareto improvement issue does not arise). At the limit, it moves from democracy to oligarchy to despotism.

The basic intuition undergirding this theory is that a concentration of power allows some to rule over others. Those with an unequal apportionment of power are less able, or even unable, to participate in government by forming coalitions or to be decisive over outcomes. This captures the main intuitions of democracy: that the people should govern collectively, through popular control over government policy, and that a person ought to govern him or herself. Diffusion of power over institutions is necessary in order to prevent concentration of power in factions and to ensure that each person realizes as close as possible to an equal voice in political decisions.

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dimension of power, preference formation, and explains how this power is an essential predicate to the free and genuine expression of other kinds of power.

Summary and Conclusion of Section 1

Let us summarize briefly. In this section, I have argued against the idea that political influence on the courts is beneficial by attacking the idea that allowing influence from elected institutions increases the democratic character of the courts. First, we noted that there are grave problems with allowing elected institutions to be the judges of the extent of their own powers. Second, we noted that the conception of democracy at work in arguments of this kind is impoverished. We noted that a general theory of democracy must take account of how power is distributed instead of focusing on voting or institutional outputs. Institutions ought to be organized to prevent concentrations of power in some hands to the detriment of others. Only by doing this can a polity ensure that it is collectively and individually self-governing, rather than allowing a subset of the population to arrogate and maintain undue concentrations of power for themselves over others.

To develop this argument, we explored the concept of power as described in previous political and philosophical literature. The concept of power as we constructed it here includes three dimensions: first, the familiar idea of power as compulsion, second, power as agenda setting, and finally, the subtlest conception of power: identity and preference-formation. We noted that the idea of democracy requires an equal distribution of all three. First, citizens must have equal power to bring to bear in public discussions. This is necessary so to prevent some from ruling over others. Second, citizens must have equal power to determine the agenda of public deliberation and decision lest some interested subset of the whole becomes able to preserve their minority interests against

the preferences of the whole, which frustrates the ability of a polity to govern itself. Finally, we noted that the power of preference formation and identity construction is important so that citizens are able to determine how to deploy their power to resolve public questions. This third dimension is a predicate for the exercise of the first two dimensions of power, because a citizen must know what she wants before she can decide how to use her other powers, and inasmuch as a person's will is not genuinely their own, but a manufactured representation of the will of another, this person is not self-governing over herself, and her will becomes merely a way for another person or group to arrogate more power unduly to itself.

Having described the idea of power, we then connected power to the concept of democracy. We noted that well-known theories of justice tend to agree that justice requires an even distribution of power among all. Then we described the idea of self-government individually and collectively. We reviewed and explicitly detailed the idea that each person must be individually self-governing in order to constitute a collectively self-governing polity. If we think about democracy as the outcome of institutions that are tolerably broadly elected then we run into the problem of how to characterize outputs that undercut the bases for institutional legitimacy. If we think about democracy as access to the franchise, and use that as the legitimacy condition got institutions that use power, then we are left with the problems of how people develop the preferences that they then bring to bear on public decision-making. It is only when we account for all stages of this process that we can develop a clear and complete picture of what collective and individual self-government means and requires.

So this section has aimed to refute the claim that political influence on the courts is

normatively desirable because it increases the democratic character of judicial decisions. On the contrary, I claim, political influence is as likely as not to ensure that judicial decisions are accountable to prevailing political powers, but not to ensuring robust self-government. Whereas this section has been devoted to refuting a popular argument for political influence on judicial decision-making, in the next section, we will explore the positive argument against political influence. We will also see how JR is an institution that can help to preserve democracy as conceived above.

4. No: Political Influence is Unacceptable

Two problems arise from the arguments in the last section: that political control over the Court is acceptable or desirable.

1) The compromise of the Court's role as understood above, as important protector of democracy and liberty.

2) The well-known maxim that like cases must be decided alike. Outside political influence compromises the rule of law.

Consider a counterfactual: there are two cases, identical but for the previous presidential election's outcome. The justices are the same; the legal merits are the same; the briefs and facts of the case are exactly the same. The cases take place in parallel universes where the outcome of the last Presidential election was different. In one case, a liberal President won, and in the other, a conservative President was inaugurated.

A different outcome between the two cases is unacceptable, though it is clearly implied by the results in the previous two chapters. The rule of law means that the only acceptable influences on the outcome of a case are the legal merits of each side's

argument. The problem that similar cases may be decided dissimilarly is especially troubling with regard to conflicts with the federal government. Extreme ideologies from the President can give an advantage because the greater the ideological distance from the Court, the greater the probability that the Court will side with the federal government (ceteris paribus). The results from especially the first chapter tend to support this claim. We have seen that ideological distance between Court median and President increases the probability of a deferential outcome for the federal government, and in the second chapter, we saw that the Court's language reflects its weakened posture with respect to the government. Electing ideologically extreme Presidents is one way to increase ideological distance, and it is reasonable to assert that vulnerable groups and individuals are all the more likely to need protection from ideological extremists than from moderates. Our results from the previous two chapters suggest that when the Court is needed most, when an extreme executive branch may seek to enact extreme policies, the justices' concern over the Court's institutional integrity leads them to shrink from the challenge. This could mean that extreme positions taken by the government under the aegis of an extreme President could escape judicial scrutiny in the many lateral legal issues that involve fundamental rights.

5. The Court's Role in This Conception of Democracy

Now we may put this conception to use. I will examine two recent Supreme Court decisions that have been subjected to extensive criticism because these cases allegedly involve improper interference with legislative acts and overly aggressive employment of the power of judicial review. These cases will serve as examples of the

virtues and vices of judicial independence, and as a backdrop to the assessment of the Court's role in a democracy. The key point here is that judicial review, like other tools, can be appropriately democratic when used properly, but can be wielded in damaging ways. This conception of democracy, as we will see, provides for strong judicial independence and liberal use of judicial review, but also provides strong guidelines as to when such devices are used improperly. The two examples are *Lawrence v. Texas* (539 U.S. 558), and *Citizens United v. FEC* (558 U.S. 310).

I will not assess the Court's doctrinal consistency, or the normative merits of either decision, outside of the effect they have on democracy so conceived. I will assess whether each decision by the Court was democratic in the sense described above.

Lawrence v. Texas

This case concerned a Texas law that criminalized sex between men. Because of the difficulty in finding and prosecuting commitments of this crime, it served mainly to stigmatize and criminalize a distinct community of people, and to discourage any who were questioning their membership in this group. The criminalization of homosexual behavior serves to disempower the members of this group by two means: first, to strip the rights of the people who were convicted under this law, and second, to limit the membership and influence of this community by branding its members criminals by dint of doing the very acts that constitute the community.

Thus, homosexuals' power on all dimensions was reduced. The first dimension [participation] was reduced by incarceration and the attendant stripping of voting rights. The second [agenda-setting] was reduced by the reduction of the first, and the resultant

difficulty in trying to set the agenda to get a criminalization repealed. The third [preference formation] was reduced by stigmatizing homosexuality, thus making it more difficult for questioning men (and likely women too) to accept the possibility that they were homosexual because of the identity of criminal that would attend its adoption. Thus the group's membership was kept small, its members branded as criminals, and many other potential members shamed into silence, or into believing that this aspect of their identity was to be ignored or suppressed.

The Texas law made homosexuals into felons, removing them from normal society, both legally and socially. Felons have substantially decreased political power and endure the shame of the brand of felon. In an important sense, their marginalization means that they are ruled over rather than being full and equal citizens.

The Court acted democratically by invalidating such a law, even though this Texas law came from a duly elected legislature. And therefore, the democratic argument against JR fails: rather than being a cost to democracy by invalidating a valid positive law, this case helped to even the distribution of power, preventing a Texas majority from disempowering a vulnerable minority group, reducing their power over themselves and the course of public deliberation and decision-making. The state of Texas used the criminal law not only to keep homosexual men at the margins of their society, but also to use the stigma of criminality to keep members of this group hidden from public view. By equating homosexuality with criminality, Texas (and other governments that did similarly) kept this minority group small because men who might join its ranks refused to consider themselves as possible members of it—they remained in the closet due to the stigma attached to homosexuality through the criminal law. Striking down such a law not

only prevented the state from using its criminal power to render homosexuals as felons and stripping their rights (including the franchise) as a result, but also sent a moral signal to Texas and the country that America's political ideals had room for homosexuals to participate on equal footing in public life. While its critics charged that striking Texas' law was undemocratic because doing so compromised the power of Texas' legislature and the majority group to which is was (ostensibly) accountable, on the contrary, I have argued that uses of JR like this one are perfectly well within the ambit of democracy the Texas law at issue in this case compromised the ability of every citizen to be self-governing both individually, and as an equal component of a polity.

Citizens United v. FEC

In this case, the Court prevented Congress from prohibiting independent expenditures by corporations and unions for political speech. Justice Kennedy, writing for the Court, claimed that the First Amendment prohibits Congress from fining citizens or associations for engaging in political speech. This case involved a political group, Citizens United, which had received some corporate money to produce a movie critical of Hillary Clinton's candidacy for President in the Democratic primary of 2008. The group released this film within 30 days of a primary election, which ran afoul of the McCain-Feingold Act's prohibition against electioneering communications within that window, and its prohibition against corporations or unions funding such electioneering speech.

Like *Lawrence*, this case saw a statute rendered unconstitutional for violating a constitutional liberty. However, unlike *Lawrence*, where the law overturned served to

disempower some groups and thus to enhance the power of others over them, the McCain-Feingold Act served to prevent undemocratic concentrations of power over political discourse and decision-making by preventing massive corporate expenditures in political campaigns. The Court's decision, which amounts to a declaration that corporations are not only legal persons (which has always been true by definition), but that they are also bearers of fundamental rights typically understood to be limited to natural persons, allows corporations to use their wealth to exert a disproportionate effect on policy and elections—far greater than most natural persons, and greater than most collections of natural persons. By helping political discourse and policy to be responsive to the influence of now-unlimited amounts of money, the Court's decision allows concentrations of power in a small set of moneyed hands. That is, the Court opened the floodgates for corporations and unions to exert influence on politicians by promising to fund their allied PACs, or to threaten to pour resources into their opponents' PACs, either in the primaries or general elections. Money has long had an influence on politics, but allowing unlimited donations to groups allied with candidates, the Court has increased the total amount of money in politics, and thus drowned out the voices of smaller contributors. By the conception set out above, this is clearly undemocratic because it upsets—or further upsets—an equal distribution of power over policy outcomes.

The problem with a decision like this is that it allows the voices of some to drown out many because of two reasons: 1) that in the age of modern media, a person with more money can speak more "loudly" through mass media than someone without much money. And 2) because all political races need funds (and substantial funds) to be competitive with other well appointed campaigns, those with money affect the content of political

messaging much more than those without, and thus exert an undue influence on public decision-making. Defining corporations as rights-bearing entities allows for double counting among the wealthier elements of a society. That is, it allows for the wealthy to donate extensively, but also then to act through the corporate structures that they control to exert yet more influence with yet more money. Because corporations have no agency outside of the will of their owners, a decision like this allows for a person to be counted, as an individual, and again to be counted as a constituent part of yet another rights-bearing entity.

The appropriate treatment for corporate speech would be not to conceive of corporations as bearers of fundamental rights so as to avoid the problems spelled out above. The better decision in *Citizens United* would have been to undo the McCain-Feingold rule against the release of political media within a specified time before an election, because as the appellants rightly alleged, nothing in the statute prevents the government from banning any kind of political speech, not just movies or television advertisements, including books. But the outcome need not have gone so far as to make corporate contributions unlimited, nor to recognize a distinction between corporations as such and the individuals who comprise them. Not to recognize corporations as bearers of any fundamental constitutional rights would have been the better outcome, and would not have opened the troubling question of what other such rights may corporations have.

There are many other implications for past, pending, and future decisions from the Supreme Court. It is easy to see, for example, what the democratic decision would be in the partisan gerrymandering cases which are pending before the Court, as of this writing.

Gerrymandering reduces the effective voting power of the vote, particularly of minority voices; it is possible to organize voting districts to produce a set of representatives that do not obtain a majority of votes across those districts. That is, gerrymandering, boosted in effectiveness by computer technology, can skew election outcomes away from the decisions of a majority of voters by "packing" partisans into one districts where their votes are contained, or "cracking" geographic areas with dense partisanship into several districts so that their voice can be effectively diluted across several districts.

The effects of gerrymandering have been well documented (e.g. Stephanopoulous and McGhee 2015; Wang 2016), and a simple mathematical test helps drive the point of its effectiveness home: consider the 2016 vote for the House of Representatives. The GOP won the popular vote for the House by 1.1 percent (or about 1.4 million votes), yet achieved a margin of control of the House of 47 seats (or about 11 percent of the total seats in the House)—a clear disparity, which shows that state districts have been arranged to magnify the margin of the popular vote ten-fold in the distribution of House seats. This a crude measure, but instructive; another more sophisticated statistical test called the "efficiency gap" measures the number of votes in each district which are superfluous to a party's victory in that district. A party with a greater number of superfluous votes is a victim of the packing-and-cracking methods described briefly above, and indicates that voters are victims of efforts to nullify effectively their votes by either putting them in a group with an abundance of their co-partisans, or making them safely subservient minority voters in a reliably partisan district. The bottom line is that gerrymandering has become a sophisticated and highly effective tool to rob citizens of effective power over

the outcomes of public decisions, while ostensibly maintaining the formal equal value of their votes. Whichever party or group benefits, such a practice is deeply undemocratic—and the conception of democracy detailed here shows exactly why: by eliminating many citizens' effective power, whereas conceptions that focus on electoral outcomes or access to the franchise would struggle to account for a problem like this. Should the judicial branch put an end to partisan gerrymandering, such a use of JR should be immune from charges of anti-democratic political meddling, because such would end a deeply undemocratic practice and restore some semblance of parity to the voting power of American citizens.

6. Conclusion

The results from the previous section are morally troubling because they imply two dangerous conclusions.

1) That the resolution of cases at the Supreme Court (if not other courts) are affected by the political environment rather than only the merits of the legal arguments; this suggests that like cases are not always decided alike

2) The Court's ability to correct imbalances in the distribution of power to resolve questions of common concern is compromised, due to the executive branch's ability to constrain its behavior.

Contrary to critics' suggestion that the Court is unaccountable, too insulated from democratic influence to make important decisions in a democracy, the analysis presented above suggests that the Court's independence and authority to restrain the legislature in an important component of an acceptable conception of democracy. Rather than

increasing the influence of the executive on the Court, an acceptable conception of democracy would protect the Court from political influence so as to mitigate the identified problems.

If democracy means the rule of the people, then each person should have an equal share in the decision-making power of the community. My theory of democracy develops a common theme in the study of democracy. Most familiar will be Robert Dahl's concept of political equality, which the equal power principle that I develop is designed to implement. The institutional arrangements introduced to implement this principle are clearly important, but a satisfactory institutional arrangement must protect and maintain this equal balance in order to deserve the name of democracy. Judicial review is but one of these. Insofar as courts protect an equal distribution of power, their actions cannot be termed undemocratic.

Clearly, other institutions can be assessed on the same grounds. Campaign finance, and access to the franchise, even public education, welfare, and other distributive programs can be assessed on this dimension. It is my hope that conceptualizing democracy as something other than simply selecting elites or consisting in basic institutions like freedom of speech and press, will expand our understanding of its requirements, and extend our understanding of self-government not only to public debate and decision, but their preconditions.

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