

THE MAJORITARIAN BASIS FOR JUDICIAL COUNTERMAJORITARIANISM

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ABSTRACT

A much-cited principle of constitutional jurisprudence is that “prejudice against discrete and insular minorities” is a “special condition” that allows heightened judicial scrutiny of legislation aimed at “particular religious ... national ... or racial minorities” (*US v. Carolene Products Co.*, n.4, 1938). This aspiration, however, leads to a puzzle regarding the ability of judges to protect minorities in separation-of-power systems: Why don't legislative majorities choose to curb courts that prevent the implementation of enacted legislation when those majorities have the legislative tools available to do so?

One answer to this puzzle is that legislators do not discipline countermajoritarian judges because legislators fear that the public would impose electoral costs on them for acting against courts. Yet that answer only pushes the question back one step. Why do we expect that popular majorities would support unelected judges against legislatures that are elected by those same majorities?

We argue that public support for courts arises because judicial review must somehow serve majoritarian interests *in ways that legislatures cannot*. In particular, we show how judicial protection of minorities can emerge as an unintended by-product of majoritarian politics. Popular majorities support judicial review because courts provide a direct benefit to those majorities by protecting them against “corrupt” or “captured” legislatures. This position is supported by evidence from a controlled experiment showing that respondents' evaluations of the Supreme Court relative to Congress are increased by reports of congressional corruption, news of judicial decisions that conform to subjects' preferences, and an interactive effect between these two treatments.

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Though many of the Framers of the United States Constitution regarded judicial independence as an important bulwark against legislative or executive tyranny (e.g., Hamilton [1788] 1996), they were also concerned that judges might substitute their will for that of the People expressed in the Constitution (e.g., Madison [1788] 1996). This ambivalence is evident in the U.S. Constitution, which guards the federal courts' independence while also granting Congress broad authority to control the resources, structure, and jurisdiction of the federal courts. As Murphy (1964) notes, "Congressmen have an impressive array of weapons which can be used against judicial power. They can impeach and remove the Justices, increase the number of Justices to any level whatever, regulate court procedure, abolish any tier of courts, confer or withdraw federal jurisdiction almost at will, cut off the money that is necessary to run the courts or to carry out specific decisions or sets of decisions, pass laws to reverse statutory interpretations, and propose constitutional amendments to reverse particular decisions or to curtail directly judicial power" (p. 26).

Yet, since the Founding, and especially since the mid-twentieth century, federal courts in general, and the Supreme Court in particular, have become increasingly prominent and institutionalized components of American national government, "seeking to control matters at the heart of contemporary politics" (Kramer 2004, p. 227; see also Burns 2009; McGuire 2004). The juxtaposition of growing judicial power with congressional authority to limit courts raises a critical puzzle for scholars of judicial politics and interinstitutional relationships. If congressional majorities have the means to control or eliminate the exercise of the judicial veto, then why don't they use those tools to prevent courts from interfering with achieving their policy goals?¹ More generally, *why do legislative majorities tolerate judicial review of laws they enact when they have it within their power to deter the judiciary from exercising its veto?*

The solution to the puzzle must be that legislative majorities tolerate judicial review because it is in their interest to do so. That is, there must be some countervailing benefit for maintaining judicial authority that compensates legislators for the policy loss they incur from the judicial veto.

¹ Some legislatures do create and maintain systems of legislative supremacy. The British Parliament is perhaps the leading example. The puzzle, though, is why legislatures *ever* tolerate a system of judicial review when they have it in their means to create a system of legislative supremacy.

Scholars have identified electoral pressure as one potentially important catalyst for legislative support of judicial review. They argue that reelection-oriented legislators tolerate judicial review because they fear electoral reprisals from voters who support courts and who will punish legislators who violate their preference for judicial independence (Caldeira 1986, Gibson, Caldeira and Baird 1998, 343, Clark 2009; Ura and Wohlfarth ND, Vanberg 2001, 2005).

But this answer only pushes the puzzle back one step and begs the question: *Why would popular majorities ever support unelected judges against elected legislatures?* It makes little sense for a popular majority to endorse an institutional arrangement—such as judicial review—that stands only to interfere with the enactments of its elected agents.

Instead, the answer must be that popular majorities support judicial review because the institution somehow supplies a benefit to popular majorities that induces their support. Further, judicial review must somehow serve majoritarian interests *in ways that legislatures cannot* in order for popular majorities broadly to support courts against legislatures. After all, if legislatures could replicate the benefits of judicial review themselves, then they could supply the service and use their authority over courts to end the exercise of the judicial veto.

In this paper, we present a unified answer to the interrelated questions of popular and legislative support for judicial power. In particular, we argue that popular majorities conditionally support judicial review as a mechanism to monitor and discipline legislative majorities who may probabilistically become unfaithful agents of the public will. By our account, popular majorities may rationally accept some countermajoritarian judicial choices as the cost of delegating the task of monitoring the legislature to a court. In turn, this popular support for courts constrains legislative majorities to accept judicial review though courts may stymie legislatures their statutory purposes.

We proceed by developing a game-theoretic model in which voters, a court, and a legislature interact with each other. We first develop a baseline model. This is a one-stage game in which the judicial veto is exercised in a purely counter-majoritarian fashion. We show that popular majorities will *not* support a purely countermajoritarian court against legislative majorities.

We then add a second stage to the game in which legislative majorities may (probabilistically) constitute itself a faction against the public and statutorily transfer resources to it or to its supporters. Voters can choose to inform themselves and monitor the legislature at a cost, they can choose to remain ignorant about the actions the legislature takes, or they can choose to support a court that (probabilistically) monitors the legislature. Parameters are identified under which popular majorities would support judicial review against legislative attempts to subjugate the court to legislative preferences. In contrast to the one-stage baseline game, the two-stage game demonstrates that countermajoritarian judicial review can be an equilibrium outcome of strategic interactions between the public, legislatures, and courts. This equilibrium is induced by the benefit that the public can obtain by delegating the task of monitoring the legislature to a court that is independent of the legislature.

Next, we translate two key parameters from the theoretical model into empirical hypotheses and test those hypotheses in a controlled experiment, manipulating subjects' exposure to information about legislative corruption and judicial decision-making. Consistent with our model, we find that support for judicial authority is associated with exposure to experimental treatments reporting corruption in Congress or judicial decisions that converge with subjects' political preferences. Moreover, we also find an interactive effect between these two factors. Subjects treated with both the "corrupt Congress" and "convergent court" conditions exhibit higher levels of support for judicial authority than subjects receiving either treatment alone.

Importantly, this suggests that judicial countermajoritarianism exists only because courts supply enough of a valued service to the electorate so that voters support judicial independence even though it will sometimes prove costly to their interests. By extension, this also indicates that a court must be attuned to majoritarian preferences. If it does not, it risks the evaporation of popular support for judicial independence.

Incentives for Legislative Maintenance of Judicial Independence

Incentives for legislatures to create and maintain independent judiciaries can be divided between "internal" incentives and "external" incentives (Rogers 2007). Theories that identify internal

incentives for legislatures to support judicial independence focus on how judicial review might assist legislators in attaining their own policy purposes. These theories do not reference the interests of actors other than those of the legislators themselves and argue that in some fashion judicial review is intrinsically valuable to legislators. Conversely, theories that identify external inducements typically hold that judicial review only stymies the ability of legislative majorities to attain their policy goals and that legislative majorities maintain independent judiciaries only because support for judicial independence external to the legislature somehow induces legislative tolerance of judicial review.

Internalist theories identify ways in which an independent judiciary serves legislative interests. These include Landes and Posner's (1975) argument that legislatures maintain independent judiciaries to extend the life of legislation beyond the enacting legislature. Whittington (2005) inverts the central feature of Landes and Posner's theory and instead argues that current legislative majorities support judicial review because the judicial veto can clear out the obstructing clutter of old legislation enacted by past legislatures. Rogers (2001) argues that judges will have better information on the policy consequences of legislation relative to the enacting legislature. Exercise of the judicial veto by sympathetic judges—i.e. judges whose policy preferences *converge* with those of the enacting legislature— then assist legislative majorities to attain their policy goals. Graber (1993) and Lovell (2003) argue that legislatures delegate controversial questions to courts because legislatures cannot or do not want to resolve them. Legislators value judicial independence in these cases because it allows them to avoid responsibility for controversial decisions.²

Externalist theories focus on how outside forces can induce legislators to maintain an independent judiciary. These theories usually identify public support for the courts as a key mechanism that generates compliance on the part of legislatures and other officials (see, e.g., Caldeira 1986, Clark 2009, Gibson, Caldeira and Baird 1998, Murphy and Tanenhaus 1990, Ura and Wohlfarth ND). When support for courts is sufficiently high, election-minded legislators---who would

² Pickerill (2005) might also be included among internalist theorists. He outlines a theory in which both courts and legislatures can achieve their policy goals in a separation-of-power system. In his theory, though, both institutions can simultaneously "win" because they maximize along different policy dimensions.

otherwise prefer to make policy without the constraint of judicial review---are induced ``to respect judicial decisions as well as the institutional integrity of a court... [by t]he fear of... a public backlash" against court-curbing activity (Vanberg 2001, p. 347).

In turn, the sources of public for courts and judicial power have become objects of much scholarly attention. In particular, current research investigates the roles that perceptions of procedural fairness (e.g., Benesh 2006; Caldeira and Gibson 1992; Gibson 1989; Lind and Tyler 1988; Staton 2005) and policy agreement (e.g., Baird 2001; Durr, Martin, and Wolbrecht 2000; Gibson, Caldeira, and Baird 1998; Gibson, Caldeira, and Spence 2003a, 2003b; Hoekstra 2003; Murphy and Tanenhaus 1968) play in motivating support for courts. More recent research by indicates that exposure to symbols of judicial legitimacy and exceptionalism also play an important role in motivating individual and aggregate trust or confidence in the courts (Caldeira and Gibson 2009).

Public Support for Unelected Courts in the Separation of Powers

Despite the richness of scholarship on the determinants of support for judicial power, the literature is incomplete. Interest in public trust and confidence in the judiciary is motivated by a view of the public as a principal "doling out bits and pieces of [its] power to various popular agents, including... judges" (Wood 1981, p. 22). The literature takes increased public confidence in courts as a signal to "dole out" another "bit" of power to the judiciary. Yet, judicial independence does not exist in a vacuum. Judicial authority is nested in the larger separation of powers and is subject to legislative oversight and control. By implication, judgments about "doling out" an additional "bit" of authority are necessarily relative.

This notion of competing public agency in the separation of powers is evident in the words of James Wilson, addressing the Pennsylvania ratification convention in 1787 ``supreme power... *resides* in the PEOPLE, as the fountain of government... They can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper" (Wilson [1787] 1987). As Ura and Wohlfarth (ND) point out, this implies that "institutional development in the separation of powers system is a function of the public's comparative judgments about the fitness and faithfulness

of its competing governmental agents.” Thus, the most pertinent question is not, *Why do popular majorities support judicial power?* Rather, the more salient questions are ultimately comparative: *Why would popular majorities support judicial rulings against their legislatures? If judges are unelected, it seems more sensible to believe that popular majorities would side with legislative majorities against unelected judges. Even if judges were elected, why would we expect judges systematically to receive more popular support than legislators?* This issue becomes even more sharply focused if we understand the judicial function as a “countermajoritarian break” on majority-supported policies that asymmetrically burden minorities. *Why would popular majorities support an institution that stymies attainment of their policy objectives?*

The general answer is that popular majorities will not support judicial review if it only serves as a countermajoritarian break on majority-supported policies. Instead, courts must somehow serve majoritarian interests and they must do so in a way that legislatures cannot in order for popular majorities broadly to support courts against legislatures. By extension, understanding the function of judicial review amidst a democratic political system provides insight into why courts can sometimes act in a countermajoritarian fashion. Nonetheless, the picture of judicial countermajoritarianism drawn here is that it is a much closer-run thing than is portrayed in much of the legal scholarship’s “obsession” with the countermajoritarian dilemma (Friedman 2002, 155). The results here resonate with the work of political scientists who argue that judicial countermajoritarianism is a much more constrained phenomenon than it is often understood to be (Dahl 1957, Graber 1993).

The Baseline Model with a Purely Countermajoritarian Judicial Veto

To understand the dynamics that might give rise to majoritarian support for judicial countermajoritarianism, we first develop a simple, baseline game played among a legislature, a court with veto power over legislative choices, and a representative or median voter. The game begins

when the type of court is selected.³ There are two possible types, each existing with some probability between zero and one. With probability q the court's policy preferences converge (C) with those of the legislature in burdening a minority group. With probability $1-q$, the court is a countermajoritarian court whose preferences diverge (D) from the legislature's. (Table 1 provides a legend for symbols and payoffs.) This type of court will seek to protect the minority group from the burden and will strike down the legislative policy. The legislature knows the court's type with certainty while the public knows only the probability distribution over the court's type.

Because at this stage we focus only on the ability of a court that exercises only a countermajoritarian veto to sustain itself against a legislative majority, the second stage of the game represents a legislative choice over a policy that would burden the minority on behalf of the majority. In this stage, the legislature chooses whether to enact (E) a policy that burdens the minority or not to enact that policy (\bar{E}). For example, the legislative policy could propose to tax all individuals equally, but limit the availability of a government-provided good only to members of the majority (e.g., public schools limited to white students) or the legislature could impose a tax only upon a minority but use the proceeds to pay for public goods available to all.⁴ If the legislature enacts a policy, then the game moves into a third stage in which the court may veto (V) or sustain (\bar{V}) the enactment. If the court vetoes the legislature's enactment, then the legislature may discipline the court (D) or leave it alone (\bar{D}). Whatever action the legislature takes regarding the judiciary, the (median) voters may reelect the legislative majority or elect their rivals (who would then undo the action of the previous legislative majority).

Payoffs are as follows. The legislature enacts a policy with policy payoff P . Legislative action costs $-\epsilon < 0$. This transaction and opportunity cost is incurred by the legislature only if it enacts legislation and if it disciplines the judiciary. If it does both, then it incurs a cost of -2ϵ . If voters throw

³ The selection of court type becomes more relevant when the game is extended to include a second stage in the next section. We include this round of play here for symmetry between the base-line model and its later extension.

⁴ James Madison discusses this temptation in *The Federalist* No. 10. Justice Stone identifies other types of burdens in footnote 3 of *Barnwell Bros.*, a theme he picks up in *Carolene Products* footnote 4.

the legislative majority out of office, it incurs a cost of $-C < 0$. This represents a loss of future policy benefits, as well as the reversal of the policy that they enacted. It is assumed that $P - 2\epsilon > 0$ and $C > \epsilon$.⁵

As mentioned above, the court has two type reflecting two possible alignments of judicial preferences to legislative preferences. The convergent-type court (C) shares the legislature's policy preferences. So it receives a policy payoff of P when the legislature enacts legislation in this stage. If it is disciplined by the legislature it receives a payoff of $-\Delta < 0$. It prefers to continue in office rather than to strike down any specific piece of legislation, so $P < \Delta$.⁶ The divergent-type court (D) has countermajoritarian preferences. That is, it opposes legislation that would burden minority groups. If enacted, it receives a payoff of $-P$. If disciplined, it receives the same payoff as the convergent court. If the court strikes down a statute, then its policy payoff is zero (0).

The majority of voters also receive a policy payoff if the legislature burdens the minority, so they receive a payoff of P when the legislature enacts the statute. If no statute is enacted or if the court strikes down the law and its decision is not overturned, then the voters receive a payoff of zero (0). If the law is struck down by the court and the legislature disciplines the court, then the same law is reenacted and sustained by the now-disciplined court. The popular majority then receives the payoff of the enacted law, P .

In the equilibrium to this game, the legislature always enacts a policy burdening the minority, and would always discipline the court if it vetoed the law. As a result, in this model, the court never vetoes laws that burden minorities. The voter would *not* discipline the legislature if the court vetoed the law and the legislature disciplined the court in response to a judicial veto. Indeed, the voter would discipline the legislature if the court vetoed the law and the legislature did *not* discipline the court. Or, the equilibrium strategy combination for all q is:

$$((E, D) | c, (E, D) | d), \bar{V}, (\bar{\Delta} | D, \Delta | \bar{D}).$$

⁵ This ensures only that the legislature prefers to implement the legislation it enacts and to hold office.

⁶ It is entirely possible that some judges would prefer to "do the right thing" irrespective of the threat of discipline (see e.g. Helmke 2005). The model can easily accommodate that change in preferences, the Court would never act strategically given those preferences.

All of the above strategies are dominant strategies for all of the actors.

In this game, because the judicial veto is deployed only in a countermajoritarian fashion, the legislature will not tolerate judicial review, and the public will always side with the legislature against the court. Therefore, in this game, the court will never act in a countermajoritarian fashion and veto legislation that burdens minorities.⁷

So why might popular majorities support a court that actually exercises a countermajoritarian veto against a majoritarian legislature? The answer we advance in this project is first to identify how exercise of the judicial veto can serve the interests of popular majorities. Next, we argue that this possibility carves out a space for judges to protect minorities at least some of the time, if they want to do so. We now turn to develop this argument.

Adding a Second Period to the Game

At the end of the first period of the game, voters determine whether electorally to punish the legislature for its response to the court's action. In effect, voters are choosing whether to support a separation-of-power system with judicial independence or support a system of legislative supremacy. Because of its relative simplicity, we first consider the second-stage game in which the judiciary has been disciplined by the legislature and is therefore no longer independent. This is represented in Figure 1.

In *The Federalist* No. 78, Alexander Hamilton observes that not only can the judiciary protect a minority against majority oppression, but the judiciary can also act as “an intermediate body between the people and the legislature” (Hamilton et al., 1961, 525). That is, the judiciary can protect popular majorities from corrupt or oppressive legislative majorities. Democratic majorities have it

⁷ This one-stage model implicitly assumes a persistent majority. A different route might be to assume that each voter has some probability of being in the minority group at some time and to iterate the game. If the actors were risk averse, they might support a countermajoritarian veto even when the legislature has not burdened them. Nonetheless, this argument is not available for some persistent minority groups, those that Justice Stone terms “insular and discrete” minorities in footnote 4 of *U.S. v. Carolene Products* (153, 1938). Stone notes that protection of these minority groups is a particular problem in democratic societies. This paper focuses on popular support for judicial review even when this special case exists, and the majority and minority persist over time.

within their capability to protect themselves from burdens that legislative majorities might attempt to place on the majority itself. In this situation, judicial protection of majority rights is unnecessary. Indeed, one well-known line of argument suggests that if the judiciary seeks to protect popular majorities from legislative majorities, that itself would undermine incentives that voters have to stay informed and involved in the democratic process (Thayer 1893).

Building on Hamilton's point, the second-stage of the model allows for the possibility of a "corrupt" or "captured" legislature that burdens the majority. We conceive of this in terms of the existence of "graft" with some probability. When the legislature enacts policies, some may be policies that benefit the majority, but others are instead are policies intended only to benefit close associates of some legislators or the legislators themselves at the expense of the majority.⁸

Initially, voters only know that graft exists with some probability. Thus, at the outset, they are asymmetrically informed regarding whether an enactment results from graft or not. Voters do not need to stay uninformed, however. They have the option of informing themselves regarding which enactments result from graft and which actually benefit the majority. Voters may directly acquire the information they need to avoid being burdened by the legislature. But attentiveness is costly, even if the cost is relatively low. We assume that voters would prefer to turn to the sports page rather than to the front page. This informational choice is endogenous to the model. Voters may also support a judiciary that also will perform this role for them. In doing so, they remain inattentive to the policy outcomes produced by the legislature, but their attentiveness is activated by a legislative attempt to discipline the judiciary. The legislative action against the court signals voters to pay attention. This signaling subgame arises endogenously within the model as well.

The available actions in the second period of the game of course depend on which path is followed in this first period of the game. Nodes followed by the designation "Ind" in Figure 1 mean that an independent judiciary at least nominally survives to the first period of the game. (While the judiciary is not officially subjugated by the legislature, the countermajoritarian-type court was

⁸ Our notions of corruption and graft embraces legislative decision-making motivated by both licit (campaign contributions, endorsements, etc.) and illicit (bribe, preferential treatment, etc.) private incentives offered to legislators.

nonetheless cowed from exercising its veto by the threat of legislative sanctions and absence of popular support.) The designation “Not Ind” means that the judiciary was formally subjugated by the legislature and a system of legislative supremacy was created. Each path implies a different subgame in the second period of the game. We will consider each in turn, beginning with the simpler of the two, the legislative-supremacy subgame.

The period 2 legislative-supremacy subgame

The sequence of this subgame is as follows. First, the type of the legislative majority is selected. With probability r the legislative majority is grafty (G) – i.e., it enacts a policy that will benefit only the legislators themselves (or their allies) and burden the voters. With probability $1-r$, the policy generates benefits to the voters (\bar{G}). Next, the legislature chooses whether or not to enact the legislation (whether grafty or not). Knowing the probability distribution over G and \bar{G} , voters then choose whether to become informed (at a cost, $i > 0$) on whether the policy is grafty or not. If the voters are informed (I), then they know the type of policy that was enacted with certainty; if they choose to remain uninformed (\bar{I}), then they still know only the probability r . After making the decision to be informed, the voters choose whether to discipline the legislature. If voters do not discipline the legislature, ($\bar{\Delta}$), then the policy is implemented and payoffs accrue. If the voters discipline the legislature, (Δ), then the current legislative majority is replaced by a new majority that repeals the legislation.

There are two pure-strategy equilibria to the subgame. They are identified in the this proposition.

Proposition. Equilibria in the legislative-supremacy subgame are:

[A] For $\frac{1}{2} \geq r$, voters choose to remain uninformed and never discipline the legislature. (If voters are informed, off-the-equilibrium path, then they discipline the legislature if the policy results from graft and does not discipline the legislature if the policy actually benefits the majority.) Both types of legislatures enact legislation. Or,

$$[(E|G, E|\bar{G}), (\bar{I}, \Delta|IG, \bar{\Delta}|\bar{I}\bar{G}, \bar{\Delta}|\bar{I})].$$

The voters payoff in this equilibrium is $P(1-2r)$. The payoff to both types of legislature is $P-\epsilon$

[B] For all $r \in [0,1]$, voters remain uninformed and always discipline the legislature if it enacts anything. Neither type of legislature enacts legislation in the subgame. Or,

$$[(\bar{E}|G, \bar{E}|\bar{G}), (\bar{I}, \Delta|IG, \bar{\Delta}|\bar{I}\bar{G}, \bar{\Delta}|\bar{I})].$$

The payoff to all actors in this equilibrium is zero (0).

Of interest in these equilibria is that the voters never inform themselves in equilibrium. If voters were informed, then the type-G legislature would never enact legislation. But if the type-G legislature never enacts legislation, then it is a waste for voters to pay cost i to be informed. Instead, voters just play the odds, never throwing out the legislative majority if they enact legislation in this subgame for $r \leq \frac{1}{2}$ in equilibrium [A], and always throwing them out if they enact legislation when $r > \frac{1}{2}$ (because equilibrium [B] is the only equilibrium if r is greater than one-half). Because the legislature will be thrown out of office if they enact legislation in equilibrium [B], the legislature enacts nothing in this equilibrium to stage-2 subgame.

The period 2 independent-judiciary subgame

We now consider the other period-2 subgame in which judicial independence continues from period 1. Table 2 lays out the sequence of play in this subgame game. As in the legislative-supremacy subgame, the legislature has two types, one in which the policy outcome is a result of graft, and one in which the policy outcome benefits the majority. The court also has two types, one in which the court's preferences are "close" to the preferences of the legislature's median voter, and one in which the court's preferences are "close" to the preferences of the popular majority's median voter. The legislature and court know each other's preferences. Voters initially only know the probability distribution over both types. Voters can, however, inform themselves of the legislature's type, at a cost.

First, each type of legislature chooses whether to enact a policy or enact nothing. Next, each type of court chooses to veto or to affirm the policy, if it is enacted. Each type of legislature then chooses whether to discipline the court if the court vetoed the policy. Given the actions of the legislature and court, voters update their beliefs about the state of the world, and choose whether they want to inform themselves of the legislative type (at a cost). Given their informational decision, voters again update their beliefs about the state of the world and choose whether to discipline the legislature for the action it took (irrespective of whether the court did or did not veto the policy). Then payoffs accrue.

Payoffs are as follows. The legislature receives a policy payoff of $P > 0$ for enacting a policy that is ultimately implemented. They incur a cost, $\varepsilon > 0$, when they enact a policy. (The legislature also incurs the transaction cost when it legislatively disciplines the court.) If the legislative majority is disciplined by the voters and turned out of office, then it incurs a cost of $C > 0$, where $C > P$ (i.e., legislators prefer to hold office than to implement their personally preferred policies). If the legislature enacts a corrupt policy, then the popular majority pays a cost $-P$. If the legislature enacts a non-corrupt policy, then the popular majority receives a payoff of P . If the voter chooses to be informed, then the voter pays an informational cost of $i > 0$. If the court's type is pro-legislative, then it receives a payoff of P when the legislature's policy is implemented. If the court's policy preferences align with the popular majority, then it receives the same payoffs as the voter. If the legislature disciplines the court, then it receives a payoff of $\Delta > 0$, and $\Delta > P$ (i.e., judges prefer to hold office than to receive a given policy payoff). If the legislature enacts no policy, then all payoffs are zero (0).

A partial-pooling/semi-separating equilibrium, defined by the court's strategy, is played by the players. The following proposition summarizes equilibrium strategies and beliefs:

Proposition. In equilibrium, the legislature plays the following strategy:

$$\left(\bar{E}|GM, E|GL, E|\bar{GM}, E|\bar{GL} \right) \left(\bar{D}|VGM, \bar{D}|VGL, \bar{D}|V\bar{GM}, \bar{D}|V\bar{GL} \right)$$

The court plays the following strategy:

$$(\bar{V}|GM, \bar{V}|GL, \bar{V}|GM, \bar{V}|GL)$$

The voter plays the following strategy:

$$\left(\bar{I}|V, \bar{I}|\bar{V}, \Delta|IG, \bar{\Delta}|IG, \Delta|D, \bar{\Delta}|\bar{D} \right).$$

Beliefs for the voter at the information acquisition stage if there is a judicial veto is:

$$\beta_1 = 1, \beta_2 = 0, \beta_3 = 0, \beta_4 = 0.$$

If there is no judicial veto, voter's beliefs are:

$$\beta'_1 = 0, \beta'_2 = \frac{r(1-s)}{1-rs}, \beta'_3 = \frac{(1-r)s}{1-rs}, \beta'_4 = \frac{(1-r)(1-s)}{1-rs}.$$

This is a semi-separating/partial pooling perfect-Bayesian equilibrium. The legislature does not enact legislation if its type is G and the Court's type is M. It enacts legislation in all other type configurations. The court vetoes legislation only when its type is M and the Leg's type is G. It affirms in all other type configurations. The voter stays ignorant, disciplines the legislature if it disciplines the court, and reelects the legislature if it does not discipline the Court.

Note that even if the court does not veto the legislation—and even though the voter does not know the true state of the world with certainty—the semi-separating/partial pooling strategy of the court allows the voter to update beliefs. Without the veto, the voter's belief is that the probability that GL is the true state of the world is $r(1-s)$. After observing the court's action, the voter knows that GL is the true state of the world with probability:

$$\frac{r(1-s)}{1-rs} > r(1-s).$$

So even when the court does not exercise its veto, it nonetheless signals useful information to the voter about its type and the type of the legislature.

The Gain from Judicial Review

Without judicial review, the legislature enacts legislation only when the probability that the legislation represents graft is less than one half (or $r \leq \frac{1}{2}$). If $r > \frac{1}{2}$, then voters will be on average be better off

by disciplining the legislature. With judicial review, voters know that the court will “sometimes” veto legislative graft. As a result, they will not discipline the legislature for some values of $r > \frac{1}{2}$.

Specifically, voters will not discipline the legislature for

$$s \geq 2 - \frac{1}{r}.$$

This is illustrated in Figure 2.

The area above the curve for $r \geq \frac{1}{2}$ in Figure 2 represents the gain from having judicial review by way of inducing the legislature to enact more legislation without fear of being disciplined by the voter. Additionally, voters gain for $r < \frac{1}{2}$ with judicial review, because legislative graft is vetoed by the court with probability s . Overall, then the voter’s gain from judicial review is:

$$\int_{r=0}^{r=1/2} sP' dr + \frac{1}{2}sP' - \int_{r=1/2}^{r=1} sP'(2 - \frac{1}{x})dr = \frac{1}{2}sP' + \frac{1}{2}sP' - sP'(2r - \ln(r)) \Big|_{r=1/2}^{r=1} = 0.693sP'.$$

This is the gain to the voter from keeping the court independent relative to allowing the legislature to subjugate the court.

Rolling Back the Stage-2 Gain from Judicial Review to the Stage-1 Game

The gain from judicial review described above accrues only in the second stage of the game. Voters still incur losses in the first stage of the game to the extent that the court protects minorities against majoritarian interests. With judicial review in the first stage of the game, voters lose P with probability $1-s$ (the probability that the court protects minority interests). Voters have an incentive in the first stage of the game to discipline the legislature if the legislature attempts to discipline the court when $0.693sP' > (1-s)P$. This off-the-equilibrium path “flip” for the voters, however, affects the incentives facing the countermajoritarian court on the (original) equilibrium path, inducing it now to protect minority groups, knowing that voters will protect it from the legislative punishment. The court is now free to operate in a countermajoritarian fashion when it wants to (subject to voters’ beliefs about its type).

We have now provided an account for the majoritarian basis for judicial countermajoritarianism. There are several notable aspects of the result. First, in this game, the majority voters do not support judicial independence because they like minorities. Rather, they support judicial independence in order to preserve the institution into the stage 2 subgame. Judicial protection of minority interests in this game is no more than an unintended consequence of majoritarian politics. Secondly, the public's toleration of judicial countermajoritarianism has definite limits. If the stage 1 cost of judicial independence gets "too large," or the stage 2 benefits of judicial independence gets "too small" (relative to each other, of course), then voters will not support judicial independence, instead supporting an effective system of legislative supremacy. There is no reason to believe that these costs and benefits remain the same over time. So the ability of courts to behave in a countermajoritarian fashion may vary with public assessments of its cost and benefit, along with the preferences of the judges to protect minorities in the first instance.

Assessment

Our theoretical model yields predictions regarding public support for judicial review. We focus on the type-space parameters "s" and "r." Specifically, support for judicial review depends on the type-space parameter "s" – which is the probability in the public's perception that the Court's preferences in the second stage of the game align with the public's interests or with the legislature's interests. Secondly, support for judicial review depends on the type-space parameter "r" – which is the public's perception of the probability that the legislature in the second period is a "grafted" legislature. We translate these theoretical parameters into experimentally-testable predictions. From the model, we hypothesize that public support for judicial review varies in response to two circumstances: (1) the perception that a legislature is "captured" by private interests—such as lobbyists or pressure groups—whose preferences diverge from those of the electorate and (2) the perception that judicial policy-making that is consistent with public opinion. In other words, public support for an unelected judiciary to have oversight over an elected legislature is contingent on both a legislature's

divergence from the voter's policy preferences and a convergence between a court's policy choices and voter sentiment.⁹

Experimental Design and Procedure

We assess these expectations using a 2x2 factorial experiment, which investigates subjects' attitudes toward the institution of judicial review as we manipulate information about (Factor 1) the relationship between interest groups and legislative behavior and (Factor 2) exposure to a controversial Supreme Court decision that might influence subjects' confidence in the judiciary.

Factor 1 involves a "corrupt legislature" treatment and a control group receiving no stimulus related

⁹ The literature on public evaluations of the Supreme Court has generally recognizes a distinction between specific support and diffuse support. Specific support represents support based on political agreement with the Court's decisions while diffuse support represents judgments about the legitimacy of the institution itself. This distinction plays out throughout the literature on measuring public evaluations of the judiciary since it is presumed that diffuse support is the more important of the two dimensions for motivating congressional support for the judiciary (see, e.g. Gibson, Caldeira, and Spence's 2003a for a recent treatment of the issue). Since our theory posits that the costs to the public associated with judicial review are ultimately associated with policy agreement, and since an assessment of this theory would, of necessity, focus on policy convergence, the assumed difference in the consequences of changes in diffuse support (large and important) and specific support (small and ephemeral) for legislative disposition toward the judiciary may be problematic for this project. Yet, recent developments in the literature indicate changes in specific support for the Supreme Court may have important consequences for judicial independence.

First, Gibson, Caldeira, and Spence's (2003b) analysis of support for the Supreme Court following *Bush v. Gore* (2000) shows that variance components of individual-level confidence related to institutional legitimacy are not sensitive to policy disagreement with the Court's decisions while variance components of confidence related to specific support are tightly linked to policy agreement. This suggests that diffuse support is a stable individual-level quantity while specific support may be more variable. This implication bears on measures of aggregate dispositions toward the Supreme Court. If diffuse support is stable at the individual level while specific support varies in response to changes in the behavior of the Court, then over time change in aggregated responses to any indicator of trust in the Supreme Court that reflects both specific and diffuse support will be dominated by changes in specific support.

Second, Ura and Wohlfarth (ND) show that changes in macro-level confidence in the Supreme Court and Congress (measured using changes in the mean "confidence" in the Supreme Court among respondents to the General Social Survey) are significantly and positively related to changes in congressional support for the Supreme Court (measured using an index of discretion and resource support). Since changes in aggregate confidence in the Supreme Court must principally proceed from changes in specific support (except in the very long run, from generational replacement, etc.) and since these dynamics are consequential for legislative support for the judiciary, investigating the processes which govern the individual-level dynamics of specific support for the Supreme Court is critical for understanding the root causes of the macro-level foundations of judicial independence. This process is the object of this study.

to conditions in the legislature. Factor 2 investigates a “controversial court” condition and a control group.

The experiment was administered online to a sample of 418 undergraduate students at Texas A&M University enrolled in (mandatory) American government courses. Subjects were randomly assigned to a treatment or control group on each of the two factors. Participants assigned to the treatment group were asked to read contrived news stories that purport to represent political conditions in the United States government and then asked a series of questions gauging their confidence in Congress and the Supreme Court. Control group members will answer the same battery of question without exposure to the stimulus articles. For Factor 1 (Legislative Corruption), participants in the treatment group were exposed to an account of a congressional scandal involving the regulation of the banking industry involving a congressman who may have received loans at below-market interest rates from financial institutions under the jurisdiction of his committee. For Factor 2 (Court Controversy), treatment subjects were asked to read a news item that presents a salient judicial decision related to the use of race in assigning students to public schools.¹⁰

Following exposure to the experimental treatments, subjects were asked to indicate their level of confidence in Congress and the Supreme Court, respectively, using a feeling thermometer item in the form used by the American National Election Study, which measure “highly general attitudes toward the institution” (Gibson, Caldeira, and Spence 2003a, p. 363). Respondents were

¹⁰ We focus on race and affirmative action in the judicial treatment for several reasons. First, the American public generally expresses deep, but relatively even, divisions on public policies meant to ameliorate the effects of racial discrimination (for a recent example, see Quinnipiac University Poll 2009). This means that random assignment of participants to receive news of a Supreme Court decision in this policy domain will produce a reasonable distribution of agreement with the Court’s purported actions that can be assessed following the exposure to the stimulus without further manipulation by the investigators. Secondly, since race is a salient policy domain and a classic “easy” issue Supreme Court decisions interfering in established policy choices in a salient issue domain are more likely to be covered by the media (Epstein and Segal 2000) and have policy implications which are understandable to many in the mass public (Carmines and Stimson 1989). The former increases the verisimilitude of the experimental treatment for study participants while the latter increases their receptivity to the experimental stimulus. Judicial decisions on salient issues are also more likely to generate a level of costs and benefits necessary to influence participants’ evaluations of courts and legislatures. Finally, the issue of race is a classic policy domain used to justify countermajoritarian judicial review and therefore ties the empirical component of this research as nearly as possible to the relevant normative and theoretical debates.

also asked to indicate their opinion about the use of race in public school assignments, which allows us to infer individual-level agreement with the contrived judicial action. In turn, these are used to construct a measure of the differential level of confidence in each branch of government expressed by the participants and to assess the extent to which exposure to the stimuli influenced subjects' evaluations of the branches of American national government.

Expectations

From our model, we predict that subjects' preferences for expanding or curbing judicial authority will be a function of the experimental conditions to which they are exposed. First, we expect that subjects receiving the congressional corruption treatment will indicate higher thermometer ratings for the Supreme Court relative to Congress than subjects in the control group. Second, we expect that subjects receiving the controversial court treatment will indicate different thermometer ratings for the Supreme Court relative to Congress than subjects in the control group conditional on their policy agreement with the court's decision. Subjects who agree with the Court's action should indicate greater warmth for the Supreme Court relative to Congress than control group members. Subjects who disagree with the Court's action should indicate less warmth for the Supreme Court relative to Congress than control group members.

Results

Patterns of expressed thermometer ratings of Congress and the Supreme Court—and the difference between respondents' ratings of the two institutions are generally consistent with our theoretical predictions. First, comparative analyses of the means of the control and experimental groups' evaluations of Congress indicate that exposure to the corrupt Congress condition significantly reduced thermometer ratings of Congress (Figure 3). Congress's mean rating for subjects in the control group was 52.61 (N=101). Among all subjects treated by the corrupt Congress condition, Congress's mean rating was 46.24 (N=212). This difference is significant ($p=0.01$).

Moreover, the difference of means also holds among those treated with the corrupt court condition only as well as subjects who were also treated with information about the judiciary. Among participants who received the corrupt Congress treatment only, the mean thermometer rating of Congress was 47.23 (N=103). Subjects who also received information that the Supreme Court made a decision on the use of race in public school assignments that agreed with their attitude on the issue provided a mean rating of 47.27 (N=22) for Congress. Those who received information that the Supreme Court had made a decision contrary to their personal preferences rated Congress 44.80 (N=87) on average.

Experimental treatments related to the judiciary had no significant effect on evaluations of Congress. Among respondents who received only the controversial court treatment, however, those who agreed with the Court's decision rated Congress slightly higher than the control group (53.56; N=25). In contrast, those who disagreed with the Court's decision rated Congress slightly worse than the control group (49.84; N=79).

In contrast to evaluations about Congress, which were largely independent of experimental treatments providing information about the judiciary, evaluations of the Supreme Court were influenced by both contextual information about congressional corruption as well as by exposure to information about the Court itself (Figure 4). The control group indicated a mean thermometer rating of 66.37 for the Supreme Court (N=101). Subjects who received the controversial court treatment and agreed with the Court's decision rated it 6.38 points higher (72.74; N=47) on average. This difference is statistically significant. Subjects who received the controversial court treatment and disagreed with the Court's decision rated it 1.49 points lower on average (64.88; N=166) than the control group; however, this difference is not significant.

These figures, however, mask important differences in the effects of the controversial court treatment conditional on subjects' exposure to the corrupt Congress condition. Subjects who received only the controversial court treatment and agreed with the Court's decision rated the Court 4.19 points higher than the control group (70.56; N=25) on average, though this difference is not significant. Subjects who received only the controversial court treatment and disagreed with the

reported decision rated the court 4.16 points lower than the control group (62.20; N=79), though, again, this difference is not significant. In contrast, subjects who agreed with the contrived Supreme Court decisions and were exposed to the corrupt Congress condition rated the Supreme Court 8.86 points higher than the control group (75.23; N=22). Subjects who received both treatments and disagreed with the Court's decision also rated the Court slightly (though insignificantly) higher than the control group (67.31; N=87). Thus, exposure to the corrupt Congress treatment increased subjects' evaluations of the Supreme Court, magnifying the positive effects of agreeing with the Court and counteracting the effects of disagreeing with the Court.

The cross-institutional effects of the corrupt Congress treatment are also evident in respondents' comparative evaluations of the Court and Congress (Figure 5). The mean difference between thermometer ratings of the Supreme Court and Congress among subjects in the control group is 13.75 (N=101). For respondents who received the corrupt Congress treatment only, the mean difference increased to 21.82—significantly higher than the control group. Respondents who received the corrupt Congress treatment and disagreed with the Court's decision in the controversial court condition evaluated the Supreme Court 8.75 (N=87) points more highly than the control group. Respondents who received both the corrupt Congress treatment and agreed with the Court's decision in the controversial court condition evaluated the Supreme Court 14.20 (N=22) points more highly than the control group. In contrast, subjects exposed to the controversial court condition only expressed relative evaluations of the Supreme Court and Congress that were statistically indistinguishable from the control group whether they agreed or disagreed with the case outcome.

Finally, multiple regression analysis of the various experimental conditions for subjects' differential evaluations of the Supreme Court and Congress provides point estimates of the effects of the experimental conditions controlling for one another as well as other observable characteristics of test subjects. We estimate an OLS model of the difference of subjects' thermometer ratings of the Supreme Court and Congress as a function of a set of dummy variables indicating exposure to the corrupt Congress treatment, the controversial court treatment, agreement with the Supreme Court's decision in the controversial court treatment, and a categorical interaction for exposure to corrupt

Congress condition and agreement with the Court's decision. We also include a set of observed characteristics of the participants, including: gender, race, ethnicity, and grade point average (on a 4.0 scale). These are reported in Table 1.

The model estimates show that experimental treatments introducing information about congressional corruption and a controversial Supreme Court decision influence subjects' comparative evaluations of the Court and Congress as predicted by our theoretical model. Both the corrupt Congress condition and agreement with the Supreme Court's decision in the controversial court treatment significantly predict increased Supreme Court thermometer ratings relative to ratings of Congress. The congressional corruption treatment predicts an increase of 7.80 points in ratings of the Court relative to Congress; agreement with the contrived Supreme Court decision predicts an increase of 3.17 points. Moreover, the confluence of exposure to information about congressional corruption and a favorable judicial outcome have an interactive effect. The two factors together predict an additional increase of 3.32 points in thermometer ratings of the Supreme Court relative to ratings of Congress. In contrast, there is no significant interactive effect for simultaneous exposure to the corrupt Congress condition and an unfavorable Supreme Court outcome.

Discussion and Conclusions

The results reported above provide much empirical support for the mass behavioral predictions derived from our theoretical model. Strictly countermajoritarian judicial review is not supportable in equilibrium relative to a representative legislature. A rational public may, however, support judicial review over a majoritarian legislature as a hedge against legislative corruption or capture, so long as the extent of judicial countermajoritarianism is not excessive. The contours of this rational calculus are evident in the behavior of our experimental subjects.

Exposure to reports of congressional corruption—leading to the promulgation of banking regulations that were not in the public interest—increased the standing of the Supreme Court relative to Congress among our study participants. At the same time, agreement with reports of a Supreme Court decision upholding the use of race in awarding oversubscribed school vouchers predicted an

increase in support for the Court relative to Congress while disagreement with the Court's reported action had a negative effect on the standing of the Supreme Court relative to Congress. Perhaps most importantly, though, these effects are interactive in the case of agreement with the Court's decision. In particular, exposure to reports of congressional corruption and an agreeable Supreme Court outcome significantly predicts increased ratings of the Court relative to Congress over and above the effects of the treatments separately. Moreover, exposure to the corrupt Congress treatment and a disagreeable Supreme Court decision predicts heightened evaluations of the Court relative to Congress, offsetting some of the negative effects of judicial countermajoritarianism alone.

These results indicate that our subjects were engaged in precisely the sort of interinstitutional balancing our theoretical model predicts. Support for the unelected Supreme Court over the elected Congress is motivated, in part, by systematic, rational responses to information about the comparative ability of the legislative and judicial branches of the federal government to act as faithful public agents. Thus, we observe empirical support for our majoritarian model of judicial countermajoritarianism.

These results have important implications. First, our theoretical and empirical results indicate that judicial countermajoritarianism is an incidental outcome of majoritarian politics. Popular majorities support judicial review and judicial independence for their own purposes. This only coincidentally happens to "carve out" space for a countermajoritarian court to protect minorities without being disciplined by the legislature. (Legislators are deterred by the threat of electoral retribution by voters.) In this account, judicial protection of minorities is more contingent than we traditionally recognize. Neither majorities in the electorate nor legislative majorities really want judicial review in and of itself. Instead, the majority of voters tolerate it in order to gain policy benefits that they really value and to minimize informational costs. Legislatures accept judicial independence because voters will (sometimes) punish them if they discipline judges.

This conclusion speaks to fundamental issues of protecting minority rights in political systems governed by majority preferences including the problem of protecting the rights of racial, religious, ethnic, and sexual minorities in pluralistic societies. In particular, these findings suggest

that majority support for potentially countermajoritarian institutions can only arise when those institutions nonetheless serve majoritarian interests. Thus, our project identifies the need to wed institutional safeguards for minorities with the interests of political majorities. This extension may provide useful insights for constitutional designers and institutional reformers who seek to develop more effective protections for minority rights within democratic political systems.

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Table 1. Legend of Symbols and Payoffs

$\{C, D\}$ - Type of Court in first stage (w/ $pr = q$)

$\{L, M\}$ - Type of Court in second stage (w/ $pr = s$)

$\{G, \bar{G}\}$ - Type of Leg in second stage (w/ $pr = r$)

E, \bar{E} - Leg chooses whether to enact policy

V, \bar{V} - Court vetoes or sustains an enactment

D, \bar{D} - Leg chooses whether to discipline court

I, \bar{I} - Voters choose to acquire info over Leg type

$\Delta, \bar{\Delta}$ - Voters choose whether to discipline Leg

----- - Information set

β_i - Voter beliefs (in period 2)

Payoffs

P, P' - Policy payoff in stage 1 (stage 2)

C - Cost to Leg of not being re-elected

Δ - Cost to Court of being disciplined

$P < \Delta$ - Judges prefer to hold office over any specific policy outcomes

ε - Decision/transaction/opportunity cost to Leg for enacting a law

- Court & Leg know each other types
- Voters don't initially know Court or Leg's type, but know the probability distribution across their type.
- Voters can acquire information about Leg's type in second stage of the game.

Figure 1. Stage-One Game Between Legislature, Court & Voter

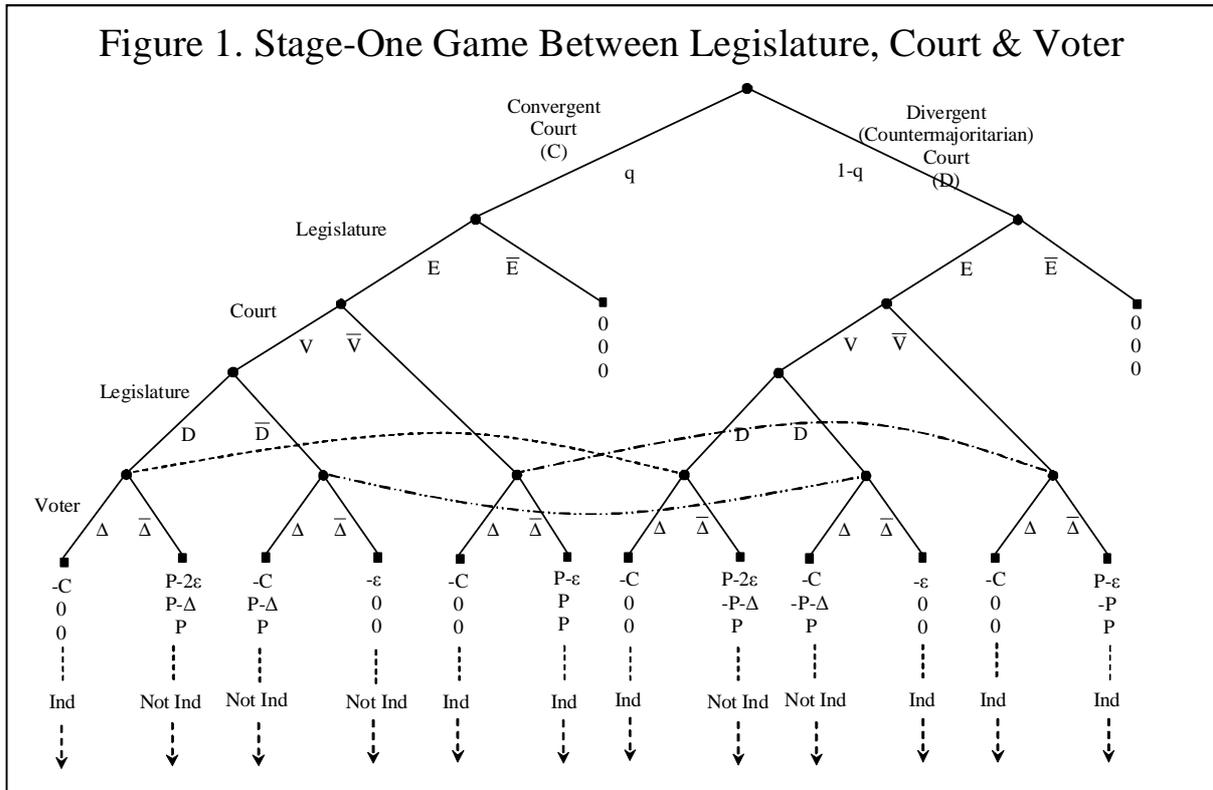


Table 2. Sequence of the Second-Stage Independent-Judiciary Subgame

1. Probability assigned for both types of legislature
(The likelihood that legislative preferences align with the median voter or that the policy results from legislative graft).

2. Probability assigned for both types of court
(The likelihood that the court preferences align with the median voter or with the median legislator)

Legislature and court know their own and each other's type; voters know only the probability distribution. Voters can inform themselves regarding the legislative type.

3. Each type of legislature chooses whether to enact a policy or enact nothing.

4. Each type of Court chooses to veto or affirm the policy.

5. Each type of legislature chooses whether to discipline the court if the court vetoed the policy.

6. Given the actions of the legislature and court, voters update their beliefs about the state of the world & choose whether to inform themselves of the legislative type (at a cost).

7. Given their informational decision, voters again update their beliefs about the state of the world and choose whether to discipline the legislature for the action it took (irrespective of whether the court did or did not veto the policy).

8. Payoffs accrue.

Table 3: Predicting Interinstitutional Feeling Thermometer Differences

<i>Predictor (Expected Sign)</i>	<i>Estimates</i>
Corrupt Congress (+)	8.29* (0.27)
Court Agree (+)	6.67* (0.76)
Court Disagree (-)	-2.03* (0.44)
Corrupt Congress, Court Agree (+)	2.54* (0.40)
Corrupt Congress, Court Disagree (+/-)	0.67* (0.05)
Female (+/-)	1.52 (1.34)
White (+/-)	6.67 (2.99)
GPA (+)	4.17* (1.33)
Constant	-6.16 (4.18)
R ²	0.09
F	4.82 $p < 0.01$

Note: Entries are OLS estimates (standard errors in parentheses). Variance estimates are clustered on each of four experimental groups. * $p < 0.05$. One-tailed tests where unidirectional hypothesis indicated by expected sign. Two-tailed tests otherwise.

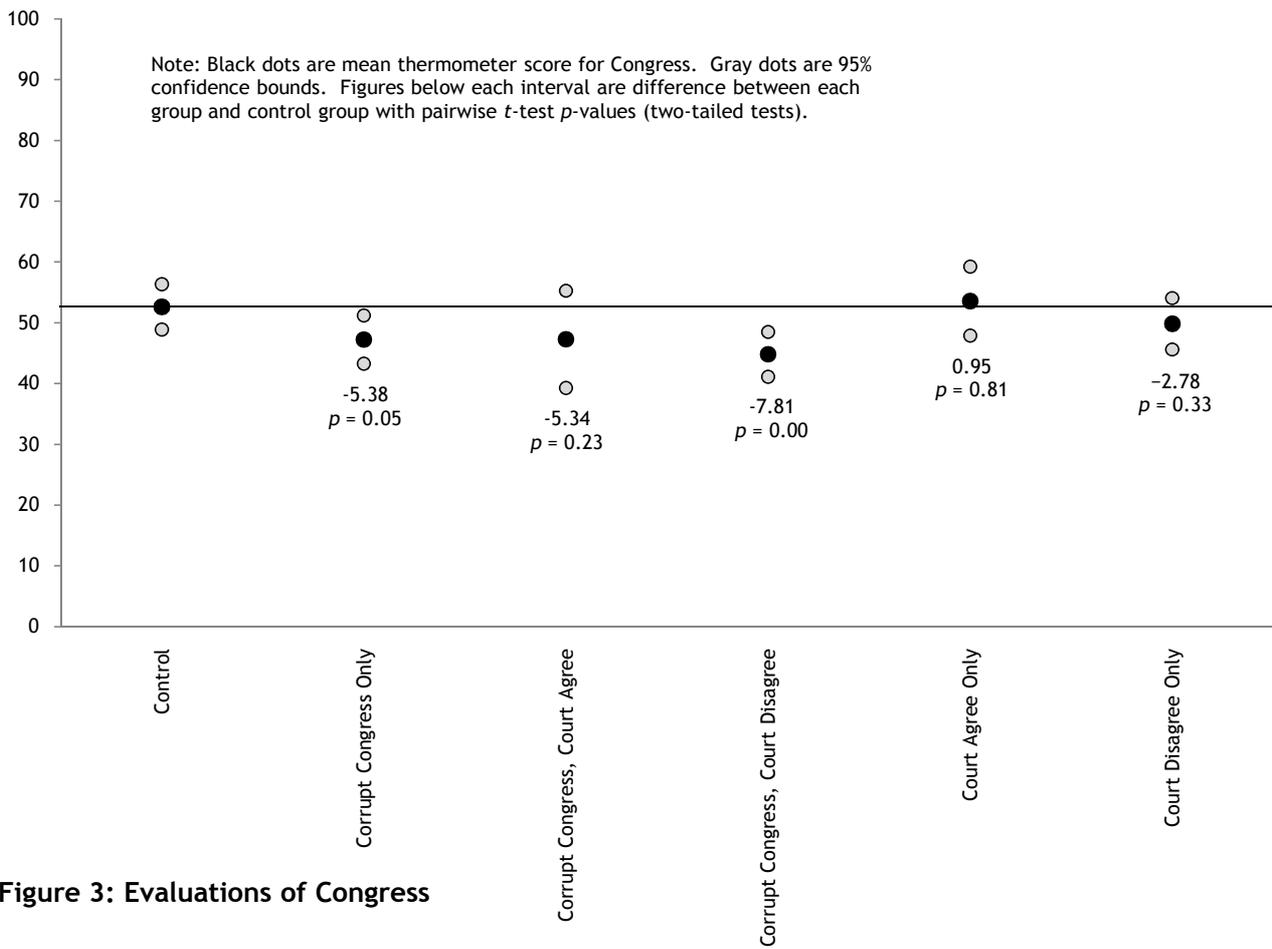


Figure 3: Evaluations of Congress

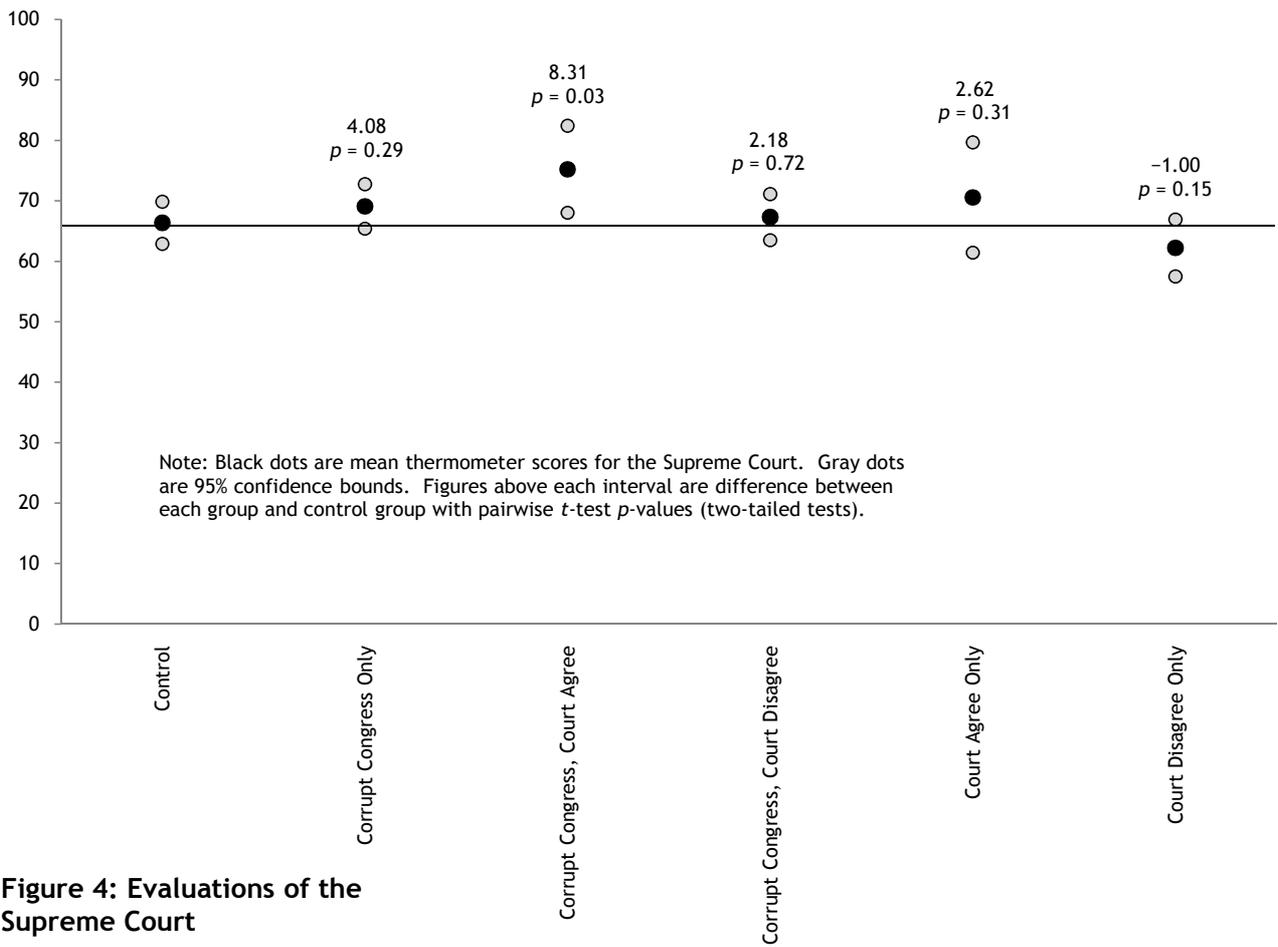


Figure 4: Evaluations of the Supreme Court

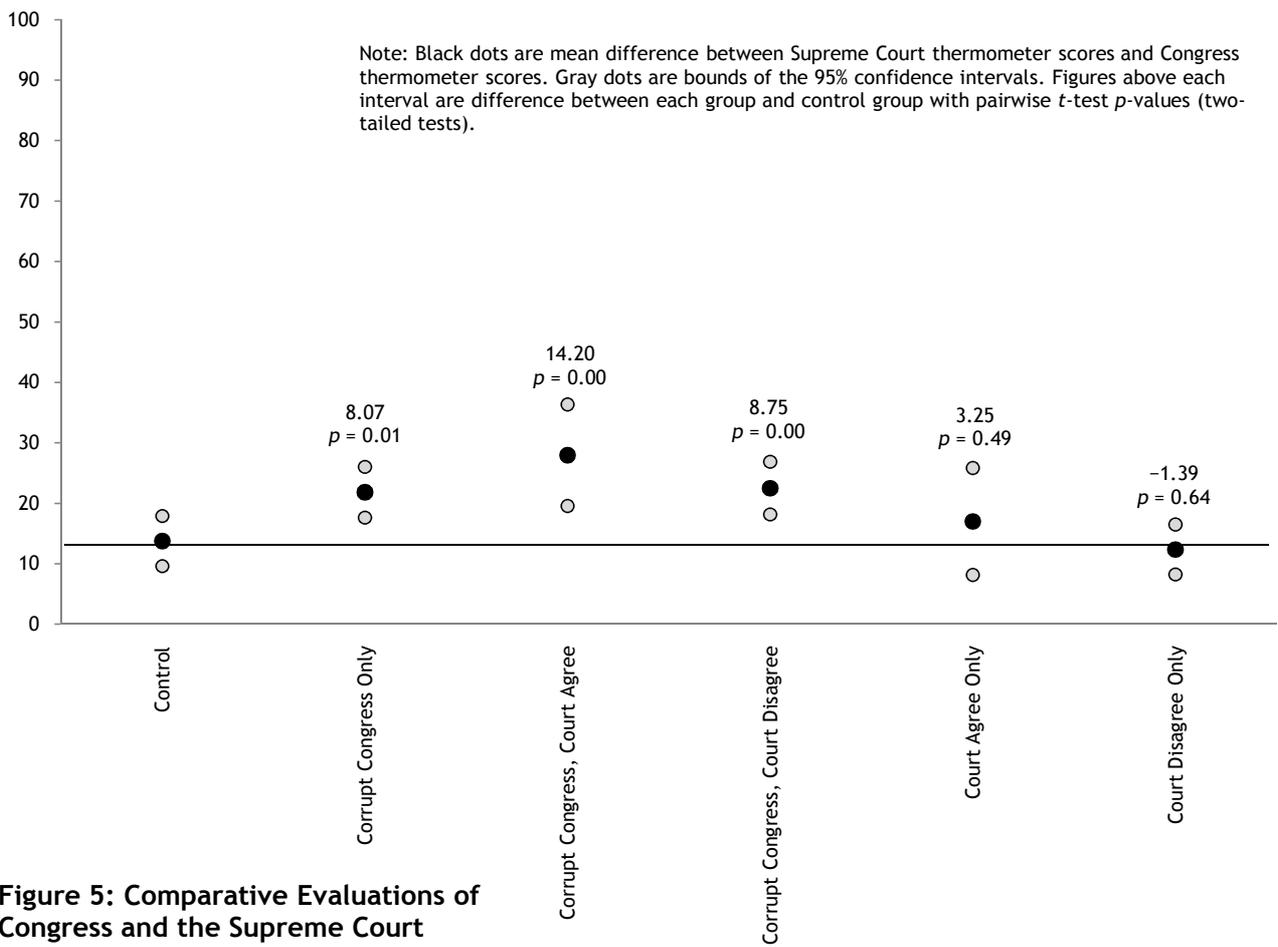


Figure 5: Comparative Evaluations of Congress and the Supreme Court



NEBRASKA LAWMAKER LATEST IMPLICATED IN SWEETHEART LOAN SCANDAL

By Michael Atwood
Associated Press Writer

Washington, DC (AP)—The House ethics committee voted unanimously to expand its official investigation into allegations that Rep. Rick Ellington, a seven-term Congressman from Nebraska and a senior member of the House banking committee, improperly received discounted loans from banks his committee is charged with regulating.

Mr. Ellington came under new scrutiny last month after the Wall Street Journal reported that e-mails leaked from the defunct lenders showed that he had been in close contact with executives at both companies and had been a pivotal figure in securing changes in federal banking rules that allowed both firms to make enormous numbers of subprime loans, many of which went bad as the housing bubble burst in 2008.

Congressman Ellington's relationships with Ameribanc and HomeFirst Mortgage have been the subject of a preliminary inquiry for more than a year following the failure of both banks in the wake of the subprime mortgage crisis. Mr. Ellington received a personal loan for \$25,000 from Ameribanc in 2004 at half the interest rate normally charged for unsecured loans as well as a discounted \$625,500 mortgage in 2005 from HomeFirst for a new Washington, DC condominium. Combined, the discounted interest rates saved Mr. Ellington nearly \$10,000 a year. Executives from both banks had also been large contributors to Mr. Ellington's reelection campaigns since he joined the House banking committee in 2000.

In a written statement, Mr. Ellington denied any wrongdoing. "Like millions of people, I shopped around for the best interest rates that I could find. I never requested any sort of special treatment from HomeFirst or Ameribanc. If I received special treatment, it was without my knowledge."

He also denied that his business relationships with the banks or their contributions to his campaigns had any influence on his decision to intervene on their behalf with federal regulators. "I used my best judgment at the time to support the effort of these banks to grow their businesses by creating new lending products for consumers. No one could have foreseen the bursting of the housing bubble."

The ethics committee vote will enable congressional investigators to examine Mr. Ellington's personal financial records and campaign documents. If the committee finds convincing evidence that Mr. Ellington traded political favors for personal gain or campaign contributions, he could be removed from the banking committee or even expelled from Congress.

However, Michelle Binder, an expert on congressional ethics at Georgetown University in Washington, DC, thinks such strong actions are unlikely. "Cozy relationships between members of Congress and powerful interest groups are often unethical and even corrupt, but they may not be technically illegal and they are difficult to prove." Dr. Binder notes that official documents or records are unlikely to prove anything. "Corrupt legislators don't usually send a printed bill for services rendered," she said.

The Ellington scandal is yet another chapter in a series of revelations related to unsavory relationships between members of Congress and troubled financial institutions as well as other recent allegations of wrongdoing among both Republicans and Democrats in Congress.

Earlier this year, it was revealed that House ways and means committee chairman Charles Rangel of New York had failed to pay thousands of dollars in taxes on rental income he received from properties he owns in New York City and the Dominican Republic.

In 2008, the Senate ethics committee alleged that Senators Chris Dodd of Connecticut and Kent Conrad of North Dakota received special interest rates on loans from Countrywide Financial while House member Rick Renzi of Arizona pleaded guilty to 35 different charges of fraud, conspiracy, and money laundering.

“We are in an especially stark period of congressional scandals,” says Dr. Binder. She explains, “Starting with Duke Cunningham selling votes to lobbyists and Mark Foley soliciting sex from congressional pages, through the Abramoff schemes and Senator Larry Craig’s arrest for indecent behavior in a men’s room, Congress has been hit by more large-scale corruption and serious scandals in the last five years than nearly any other time in its history. There is a real culture of corruption in Congress these days.”



SUPREME COURT RULES IN OHIO SCHOOL RACE CASE

By Jack Henry
Associated Press Legal Correspondent

Washington, DC (AP)—The United States Supreme Court today ruled that the Constitution permits local schools boards to give priority to African-American, Hispanic, and other minority students in awarding vouchers to cover the cost of attending private schools.

The 7 to 2 decision in *Franklin v. Cleveland Municipal School Authority* upholds a policy of the local school district in Cleveland, OH that uses a point system to award private school vouchers to students when the number of applicants to the voucher program exceeds the number of available vouchers. Students who apply to the program are given points based on a variety of factors including family income and having special education needs. The system also awards a fixed number of points to students who identify themselves as members of “historically disadvantaged racial and ethnic groups.” The effect of the policy is to give preference in receiving vouchers to minority students when they have the same number of points from other factors as white students on the applicant list.

On behalf of the Court’s majority, Justice Anthony Kennedy wrote, “Overcoming the nation’s enduring legacy of racial discrimination is a compelling state interest. This Court’s decisions have consistently recognized that the efforts of state and local governments to fight discrimination by using race as a factor in distributing educational benefits do not violate the Constitution, so long as race is not the only or predominant influence in the decision-making process.” He continued, “Since the Cleveland process uses factors besides race to award most of the points in its voucher system, it is constitutionally acceptable to use race to make close-calls.”

Justice Antonin Scalia, one of two justices who disagreed with the majority’s rule, was sharply critical of Justice Kennedy’s reasoning. In a dissenting opinion, Scalia wrote, “If the Equal Protection Clause of the Fourteenth Amendment means anything, it must mean that the government cannot treat its citizens differently on the basis of the color of their skin. That principle is violated just as strongly when white children are denied the chance to participate in a voucher program on a level playing field with other students as when black children are sent to inferior segregated schools.”

Experts believe that Court’s decision will have a large impact on voucher experiments across the country. Delia Bailey, an education policy specialist at the Brookings Institution in Washington, DC, thinks that the door is now open for local school boards to try other race-based policies.

“Affirmative action has traditionally been an educational issue at colleges and universities. But, as more and more local schools districts try out charter schools, vouchers, and other kinds of limited enrollment programs, debates about racial discrimination and diversity are bound to come up more often,” says Bailey.