The Limits of Judicial Independence

Tom S. Clark

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The Limits of Judicial Independence

This book investigates the causes and consequences of congressional attacks on the U.S. Supreme Court, arguing that the extent of public support for judicial independence constitutes the practical limit of judicial independence. First, the book presents a historical overview of Court-curbing proposals in Congress. Then, building on interviews with Supreme Court justices, members of Congress, and judicial and legislative staffers, as well as existing research, the book theorizes that congressional attacks are driven by public discontent with the Court. From this theoretical model, predictions are derived about the decision to engage in Court-curbing and judicial responsiveness to Court-curbing activity in Congress. *The Limits of Judicial Independence* draws on illustrative archival evidence, systematic analysis of an original dataset of Court-curbing proposals introduced in Congress from 1877 onward, and judicial decisions. This evidence demonstrates that Court-curbing is driven primarily by public opposition to the Court, and that the Court responds to those proposals by engaging in self-restraint and moderating its decisions.

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Emory University

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For Leigh Anne

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1

Introduction

Among all of the institutional features of the American Constitution, none is more significant than the separation of powers. Separation of powers represents perhaps the most important contribution the American experiment has made to constitutional democracy throughout the world. With its roots in Montesquieu's insight, the notion of setting power to counteract power has grown into a principle of limited self-government that motivates constitutional democracies in every corner of the globe. In the context of the American judiciary, the separation of powers is a particularly interesting and perplexing institution. Although the courts are often considered strong institutions with the power to exercise a constitutional veto over majoritarian politics, the federal judiciary has been referred to as "the least dangerous branch," following from Alexander Hamilton's famous assertion that the Court "is possessed of neither force nor will, but merely judgment."[1] These seemingly diminutive descriptions of the courts are due to their lack of constitutional authority of enforcement and their reliance on action by the elected branches to give effect to judicial decisions. That is, the judiciary has "neither purse nor sword" and relies instead on legislative or executive powers for its institutional efficacy. Indeed, the separation of powers among governing institutions is a hallmark of the American Constitution and was a guiding principle for the Framers. In this vein, James Madison observed in *The Federalist* that each of the original states had chosen to divide governing powers among multiple institutions while also providing overlap and cross-checking vetoes. He also noted that realizing the American goals of freedom and liberty

[1] *The Federalist* #78.

requires that government be self-limiting. To achieve this goal, he wrote, "ambition must be made to counteract ambition."[2]

Owing to the founding principle that the government be limited by setting power to check power, and the apparently weak institutional position of the judiciary, one might expect that the Supreme Court's decision making should be constrained by the necessity of political will to see any of its policy goals carried out. A major focus of scholarship on the role of courts in policymaking suggests they are in fact unable to bring about significant policy change without having at least political will to enforce their decisions. Gerald Rosenberg (1991) finds that a lack of political will – the willingness of political actors to take action to carry into effect judicial decisions – was the cause of delayed enforcement of the Supreme Court's order to desegregate public schools in *Brown v. Board of Education*. Despite these claims and the apparent weak institutional position in which the judiciary finds itself, both popular journalism and scholarly literature frequently claim that the Court's discretion is virtually limitless and that the Court is free to pursue its ideological and policy goals without constraint by the political system.

From an empirical perspective, popular critics bemoan an imperial Court, composed of unelected, life-tenured judges, whereas political scientists have documented evidence that the Supreme Court is primarily motivated by its own policy goals and that there does not appear to be anything in the political system that can attenuate its ability to pursue those goals (Segal and Spaeth 2002). Critics of that view, though, have observed that Congress does have tools for overcoming the Court's power. With the power to control the Court's budget, jurisdiction, and calendar – as well as the power to increase or decrease the size of the courts and the senatorial power to confirm judges nominated by the president – one might reasonably expect that Congress is able to exert some influence on how judges decide cases. Indeed, these tools, given to Congress by the Constitution, are the defining feature of the American separation of powers.[3] Nevertheless, evidence that these tools constrain

[2] See *The Federalist*, #47 and #51.

[3] I distinguish the American separation of powers from other separation-of-powers systems. In France, for example, the separation-of-powers is given a very different interpretation. Rather than enabling each branch of government to "check" each other, the various branches are given very specific and hard spheres of autonomy. The solution to preventing unchecked accumulation of power, under the French interpretation, is to endow each institution with a strict sphere of autonomy that no other institution can breach and that the particular institution *cannot exceed*. In my sense, then, there is very little that distinguishes separation of powers from checks and balances.

the Court and operate as effective limits on judicial power has been mixed at best.

From a more theoretical perspective, a related academic debate concerns the so-called countermajoritarian difficulty. The countermajoritarian difficulty asks how we can reconcile American norms of democracy and majority rule with the Supreme Court's constitutional veto over democratically crafted laws and has been the defining question of American constitutional theory for the past century. Because the Supreme Court is unelected and essentially unaccountable, how do we square our commitment to democracy with judicial supremacy in the realm of constitutional interpretation?[4] Responses to these questions have been numerous and come in a variety of forms. Most notably, normative constitutional theorists have developed various prescriptions for the use of judicial review by the Court (Thayer 1893; Llewellyn 1934; Wechsler 1959; Bickel 1962; Ely 1980).

Each of these lines of inquiry, though, is concerned with the same question – what is the balance of power between the courts and the elected branches of government, and what are the limits of judicial independence? In this book, I approach this debate from a different perspective and offer both theoretical and empirical insights into the countermajoritarian difficulty. Although I recognize the importance of institutional tools for interactions among the branches of government, I contend that another, perhaps more important, component of the limitations on the Court's institutional independence is a form of indirect representation on the Court. As already noted, the Court is without power to effect policy changes without political will or political "nerve" on the part of elected officials with the power to implement judicial decisions. A key determinant of political will is public will. Elected officials were reluctant to enforce desegregation following *Brown* because the public did not approve of the decisions and would punish their representatives if they were to act against segregation. Similarly, elected officials continue to work to prohibit abortion because their constituents do not respect the Court's decision in *Roe v. Wade* and want to see it evaded. We also see evidence of continued disregard for the Court's prohibition on school prayer, especially in the South. Thus, I argue that because the Court relies

[4] Of course, a large scholarly debate has emerged, in part in response to this question, examining the extent to which the Court does in fact have the final word on matters constitutional. In general, most scholars believe that, at least sometimes, the Court does not have the final word on constitutional meaning, either in theory or in practice. However, it is largely conceded that most often the Court does have the final say.

on political will to give effect to its decisions, and because political will is often directed by public opinion, the most relevant constraining force on judicial power is public support for the Court. In this way, the public plays a subtle yet important role in the courtroom and in interinstitutional interactions between Congress and the courts.

Scholars have long been interested in the determinants of public willingness to support divergent decisions from the Supreme Court. Political scientists and legal academics have concluded that the perception of judicial decisions as *legitimate* is a reason why the public will support enforcement of decisions with which it disagrees. Grossman (1984, 214) characterizes the scholarly interpretation of legitimacy as "essentially a normative concept, [which] questions the authority of courts to displace the value choices of elected legislative bodies by judicially fashioned policies." Because the public perceives the Court as acting on higher, constitutional authority in the capacity of a legal institution rather than on ideological grounds as a political institution, divergent decisions are perceived as more acceptable. Indeed, this is a relationship recognized by the Court. In an interview, one Supreme Court Justice commented to me, "It is important that the Court have institutional prestige in order to make decisions that the public may not like but will accept as legitimate."[5] The central argument I advance in this book is that the most effective limit on judicial independence is the need for institutional support from those who really wield power in a democracy – the people. Courts (and the U.S. Supreme Court in particular) generally benefit from a high level of diffuse public support. As a consequence, elite will is not necessarily enough to check the courts; rather the separation of powers requires a degree of public will to "rein in" the judiciary.[6]

[5] This book will make substantial use of evidence gleaned from interviews I conducted with Supreme Court justices, members of Congress, former law clerks, and legislative staffers. Additional details are provided in Chapter 3, and a full description of the interview methodology is provided in the appendix to this book.

[6] The reason public support for a check on the court is necessary is that public support for the court is a determinant of the court's *institutional legitimacy*. Legitimacy is a source of power for the Court – perhaps the most important source of power – because it is a resource on which it can draw to make decisions with which the public and political actors will disagree. In particular, I invoke the term to refer to what scholars have called "diffuse support." To be sure, political scientists and legal academics have studied a variety of forms of judicial legitimacy and have attributed to it a variety of meanings. I recognize this impressive and consequential area of research but confine the analysis here to a single, limited conception. Judicial legitimacy will refer throughout to diffuse support, which acts as a reservoir of good will that can induce elites to comply with decisions with which they may disagree. I will provide a fuller discussion on this point in Chapter 3.

In the remainder of this chapter, I first sketch the terms of the scholarly debate as it now stands. I then discuss the importance of diffuse public support for the judiciary and describe how concerns for such support affect interactions between courts and the other branches. In particular, I suggest that legislative attacks on the Court – what I define below as Court-curbing – are an important feature of this interaction. Finally, I conclude by providing an overview of the research that I present in subsequent chapters and preview the conclusions that I draw from that research.

1.1 POLITICS AND JUDICIAL INDEPENDENCE

In the study of the separation of powers and the judiciary, the central question of interest is one of judicial independence. How much influence do extrajudicial actors have on judicial decision making? Judicial independence has been considered in a variety of contexts and from a variety of methodological and theoretical perspectives. Indeed, the attention that the subject has received has in many ways led to considerable confusion about what we mean when we speak of judicial independence – so much so that a group of scholars recently attempted to clarify both how to study judicial independence and exactly what judicial independence is (Burbank and Friedman 2002).

In this book, I adopt the definition most commonly used by political scientists – *judicial independence* refers to a court's ability to make decisions that are unaffected by political pressure from outside of the judiciary. Judicial independence is in this sense strongly related to judicial power. To study judicial independence, I focus on structural features of the judicial system and the separation of powers. Historically, we have seen that structural features of a judicial system – such as life tenure, salary protection, and so forth – can be broken down. When this is the case, formal structural protections may be reduced to mere "parchment barriers" against political encroachments on the judiciary. The focus of the present study is to examine how breakdowns in judicial independence (or the possibility of a breakdown) influence the choices judges make.

Throughout this book, I also refer to the separation of powers; this term is one that also has been muddied throughout the course of academic debate and development. Here, I adopt a specific definition. The *separation of powers* refers to the checks and balances that enable governing institutions to impose on each other's decision-making autonomy. An exercise of the separation-of-powers, for example, is an instance in

which political power is used to stop the Supreme Court from making a particular choice. A successful exercise of the separation of powers means that judicial independence, as I have defined it here, has broken down. Historically, breakdowns in judicial independence have occurred in most systems at one point or another. Substantial scholarly work has shown that formal protections of the judiciary break down in places like Argentina, Russia, and Hungary. This research also suggests in places like Japan, England, Germany, Mexico, and the European Union more informal norms and protections can easily break down.[7] For when the judiciary is out of line with a unified set of elected branches of government, the judiciary may very well find itself in a perilous position and risk significant consequences if it uses its power to thwart the elected majority's will (Ferejohn 1999).

Judicial independence, though, need not be a necessarily shaky protection for the courts. Cultural norms may create incentives for political officials to tolerate a divergent independent judiciary (Weingast 1997), and there may be other reasons why elected officials would refrain from using their power to sanction a recalcitrant judiciary. For example, an independent judiciary may be politically desirable because it can help entrench current policies and insulate them from future majorities (Landes and Posner 1975). On the other hand, precisely the opposite reason may support the political preservation of an independent judiciary – the courts may be useful because they can allow the current majority to overcome past political bargains with which the current majority disagrees (Whittington 2003, 2005). Or, perhaps an independent court may be useful for overcoming "bad" political bargains because the courts' power to review policies after implementation, combined with their legal expertise, creates a system in which judicial review of legislation helps resolve policy uncertainty (Rogers 2001). At the same time, scholars have explicitly referenced public support for the courts as a source of judicial independence (Caldeira and Gibson 1992; Gibson, Caldeira, and Baird 1998; Vanberg 2005; Staton 2010).

For whatever reason, one thing is clear: in order to preserve judicial independence, there must be incentives for those with the power to destroy the courts to maintain judicial power. This is a feature of politics that is pervasive; institutions that serve the interests of politicians are more likely

[7] See Helmke (2002); Iaryczower, Spiller, and Tommasi (2002); Hausmaninger (1995); Scheppele (1999); Ramseyer (1994); Ramseyer and Rasmusen (2001); Salzberger and Fenn (1999); Vanberg (2005); Staton (2010); Carrubba (2005).

to be sustained by those politicians than are institutions that frustrate their interests (Weingast 1997). In this book, I am concerned with the conditions under which the incentives for political actors to maintain judicial independence are insufficient. Under what conditions is judicial independence overcome by the separation of powers?

The intent of the current project is to examine the conditions under which one should expect to see protections of judicial independence break down. I show that waning public support for the Court manifests itself in the form of institutional signals from the elected branches of government – specifically, Congress – to the Court about the Court's standing with the public. Because the Court relies on public support in order to be an efficacious policy maker, upon observing signals of waning public support, the Court is more likely to lose judicial independence and make a decision constrained by the preferences of the elected majority.

1.1.1 Between Legal Rules and Telephone Justice

Independence and a lack of independence are not the only two possible institutional designs. Rather, judicial independence exists on a continuum. At one end, the judiciary is completely subservient to political pressure. At the other, the judiciary reigns unchecked, acting as an "imperial" court. The question is, how much political pressure is brought to bear on the judiciary, and how does the judiciary respond to that pressure? There are several ways in which political pressure can be brought to bear on the judiciary. Perhaps the most flagrant – and, to American sensibilities, disturbing – form of political control of the courts occurs by direct efforts to influence a judge, what is commonly referred to as "telephone justice." Telephone justice describes a system in which an elected official may call a judge on the telephone and direct that judge to decide a particular case in a particular way. At the other end of the spectrum fall "legal rules" or guidelines. For example, the United States Constitution sets requirements for cases that the Supreme Court may hear and gives Congress power to prescribe jurisdictional boundaries for the Court.

This book is concerned with a type of exercise of the separation of powers that falls in between legal rules and telephone justice. Specifically, I focus on institutional interactions between a legislative body and a judiciary. There exists a grey area in between blatant political pressure, such as telephone justice, and explicit legal rules, such as jurisdictional and mootness requirements. In this grey area, the Court may have the power to make a certain decision but may be constrained by long-term

(or even short-term) considerations about the consequences that will follow from its decision. The question raised by this grey area is: what are the incentives created by the American institutional design and under what conditions can the Court be induced to exercise self-restraint?[8]

Students of Supreme Court–Congress interactions have suspected that ideological divergence between the Court and Congress, in and of itself, should be sufficient to induce the Court to exercise self-restraint. Although the judges of the federal judiciary may be independent in the sense that they have tenure during good behavior and protection of their salaries (among other things), the judiciary as an institution is very weak and depends heavily upon support from the elected branches of government in order to use its power (Ferejohn 1999). Therefore, when the Court and Congress disagree about policy, the court should have an incentive to "hold back" and make decisions that, while not ideal from the Court's ideological stance, will nevertheless be enforced by the relevant political actors (Marks 1989; Ferejohn and Shipan 1990). This is a theme that permeates both normative and positive studies of the judiciary and explicitly underlies much of constitutional theory scholarship. When the elected majorities are aligned against the courts and the courts exercise their power to thwart the majority's will, then the courts risk considerable consequences. The problem that motivates constitutional theorists is one of how to balance a normatively desirable judicial function of protecting minorities and enforcing their rights against equally desirable American notions of majoritarianism and democracy. This very problem has been the defining question of constitutional theory for the past century (Bickel 1962), and I will return to this theme in Chapter 7. For now, though, I note that the extent to which public support for the Court may influence judicial decision making has direct implications for normative debates about the constitutional theory of judicial power.

Particularly when empirically investigating these debates, scholars have largely distinguished between statutory decision making and constitutional decision making. Because statutory decisions can be reversed through ordinary legislation, whereas constitutional decisions require a constitutional amendment to be overridden, it is often assumed that the Court should be more responsive to congressional preferences in the context of statutory decision making. Indeed, because of the difficulty of

[8] Because I am concerned with judicial independence in the American context, I focus on the case in which Congress takes an action to intimidate the Supreme Court.

reversing constitutional decisions by the Court, it is on constitutional decision making that the normative literature has primarily focused. For, it is the Court's power to making "binding" constitutional law while not being held electorally accountable that troubles constitutional theorists; this is the very definition of the "countermajoritarian difficulty." By contrast, empirical scholars have focused on statutory decision making, because it is in this area of decision making, if at all, we should expect to find judicial deference to the policy preferences of the elected branches. The theoretical argument I advance, however, applies equally well to both constitutional and statutory decision making, and will have direct implications for both normative debates about the countermajoritarian difficulty and empirical scholarship on judicial independence.

1.1.2 The Separation-of-Powers Model

In political science scholarship, the paradigmatic approach to studying whether ideological divergence between the Court and the elected branches induces the Court to exercise self-restraint is known as the separation-of-powers model. Various versions of the separation-of-powers model – ranging from "soft" rational choice (Murphy 1964; Epstein and Knight 1998) to rigorous positive political theory (Ferejohn and Shipan 1990; Spiller and Gely 1992; Clinton 1994; Knight and Epstein 1996; Stephenson 2004; Carrubba 2005; Rogers 2001; Vanberg 2005) – have been proposed. Generally, though, these theories all posit a comparable set of assumptions and incentives about judicial–legislative relations. They contend that the justices of the Supreme Court may not always act independent of the elected branches – rather, the institutional arrangements of the separation of powers create an incentive for sophisticated decision making.[9] Whether acting to manipulate the opinion of the Court (Murphy 1964; Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000) or to avoid cases that may have adverse political consequences (Perry 1991; Murphy 1964; Boucher and Segal 1995), sophisticated behavior is simply a product of the institutional setting in which the justices operate.

[9] Sophisticated decision making refers to a strategic choice by an individual to choose something other than her most preferred option, because the ultimate consequence of choosing the most preferred option would lead to a suboptimal ultimate outcome. This is contrasted with sincere decision making in which an actor always chooses – strategically or not – her most preferred option.

In the foundational study of strategic behavior on the Supreme Court, Murphy (1964) demonstrates that under certain circumstances, the justices sometimes have to take account of the external political environment in which their decisions will be received.[10] In this respect, the justices have two considerations: securing that their decisions will be enforced and reducing the effects of hostile political reactions (Murphy 1964, 123).

> The obvious strategy open to a Justice in confronting a statute which threatens his policy objectives is the simple and direct one of attempting to sweep it into constitutional oblivion by declaring it invalid. . . . In some instances a Justice might be certain that such a direct course was necessary and prudent; in other circumstances he would have grave doubts about the appropriateness or effectiveness of its use. . . . [One reason he may have doubts is that] there is always the danger of constitutional decisions generating a counterattack, either against the particular policy which was defended from congressional opposition or against the Court itself. (Murphy 1964, 156–7)

Importantly, in each version of the separation-of-powers model, the justices actually fear political reprisal. The threat of meaningful congressional response to judicial decisions is sufficient to create incentives for the justices to engage in sophisticated decision making.

Separation-of-powers theories have generally made extensive use of spatial models of voting. Specifically, constrained court theories claim that the ideological preferences of Congress will limit the range of decisions available to the justices. In the first such model of judicial decision making, Marks (1989) proposed that a single-dimensional spatial model of institutional interactions can demonstrate that the ideological preferences of key institutional actors can either cause the Supreme Court to strategically alter the position at which it sets policy or give the Court complete freedom to set its own ideal policy. The intuition behind these models is given in Figure 1.1. This figure shows a single policy dimension, running from left to right. Each of the House of Representatives, the Senate, and the Supreme Court have ideal points in this policy dimension – their favorite policies. Because, at least in statutory cases, Congress can reverse a Supreme Court decision if both chambers can agree on a new law, the Court may sometimes have an incentive to deviate from its own

[10] Murphy's book is primarily concerned with strategic interactions among justices, rather than between the Court and an elected institution. However, the interaction between the Court and the external political world is an important component of judicial decision making and intra-Court negotiation, as Murphy makes clear. Indeed, in an earlier book, Murphy (1962) explicitly addresses the interaction between the Court and Congress.

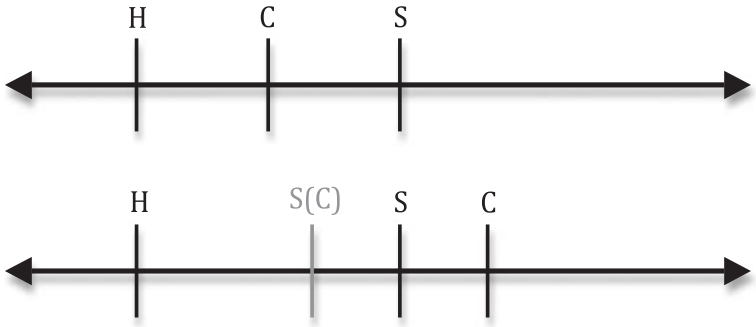

FIGURE 1.1. *Standard representation of the Court–Congress separation-of-powers model.* H, S, and C show ideal points for the House, Senate, and Court, respectively.

preferred policy. Consider the first example in Figure 1.1; in this case, the Supreme Court's ideal policy falls in between the House's and the Senate's. If the Court were to decide a case and set policy at its own ideal point, Congress would be unable to reverse that decision. Notice that if Congress were to try to move that decision closer toward the House's ideal policy, the Senate would not agree; if Congress were to try to move that decision closer to the Senate's ideal policy, the House would not agree. The veto that each chamber has over policy creates a "gridlock interval" (Krehbiel 1998) that insulates the Court's ideal policy from congressional reversal.[11]

By contrast, consider the second example in Figure 1.1. Here, the Court's ideal point is to the right of *both* the House's and Senate's. If the Court were to set its own ideal point, both the House and the Senate would agree to move the Court's decision. In particular, the Senate would agree to any policy that falls to the left of the Court's ideal point *and* to the right of the point S(C), shown in grey. The point S(C) is just as far away from the Senate's ideal point as is the Court's ideal point; thus, any policy in between S(C) and C is better for the Senate than C.[12] As a consequence, if the Court sets policy at its own ideal point, the House

[11] Of course, the president also has a veto, which may or may not be relevant in any given case. Inclusion of the president in this model does not significantly change the example I describe here but merely adds an additional condition that must be satisfied in order to achieve congressional reversal. Namely, the president must agree with the policy change.

[12] This result derives from the standard assumption that each player's utility from a policy is simply a function of the absolute distance between her ideal point and the relevant policy.

could propose legislation at the point S(C), which is much better for the House, and the Senate would not object. (Alternatively, the House could propose legislation just to the right of S(C), if it were concerned the Senate would side with the Court in the event it were indifferent between the House's proposal and the Court's ideal point.) A forward-looking Court then would have the incentive to set policy in the first instance not at its own ideal point but rather right at the Senate's ideal point. This decision would ensure that the Court's policy could not be reversed; it also is the best possible policy from among those that Congress cannot change.[13] This sophisticated decision to deviate from its own ideal point is motivated by the Court's foresight that there is a range of policies that will be agreeable to the Senate and the House; the Court has a first-mover advantage, though, and can select its own preferred policy from among those that cannot be reversed. If it were to disregard this incentive and simply select its own ideal policy, then Congress would surely reverse that decision, and the Court may wind up with a new policy that is worse (from its perspective) than what it could have selected in the first instance. It is this type of sophisticated decision making that the traditional separation-of-powers model predicts.

Separation-of-powers models, however theoretically sophisticated, have not found much empirical support. In fact, the bulk of the empirical evidence suggests that the Supreme Court is not at all influenced by congressional ideology. Most prominently, Segal and Spaeth (2002, ch. 8) advance the "attitudinal model" of judicial decision making, which posits that a justice's own ideology is the primary determinant of judicial decisions and that considerations about policy reversals or other backlash from Congress do not affect the justices. Advocates of the attitudinal model generally cite five features of the federal judiciary to justify their claim that the Court can operate free from political considerations. First, Supreme Court justices *control their own docket*. "While not a guarantee that the justices will vote their policy preferences, it is a requisite for their doing so" (Segal and Spaeth 2002, 93). Thus, the Supreme Court's discretionary docket enables it to select the cases that allow it to vote its preferences.[14] Second, the Supreme Court is immune to *electoral*

[13] The set of policies that Congress cannot change is called the Pareto optima. Any policy from H through S is a Pareto optimum. The Court's strategic goal in this example is to select the best policy – from its own perspective – from among the Pareto optima.

[14] Of course, this gives rise to the possibility that case selection may itself be a strategic process. Indeed, some evidence is suggestive of strategic case selection by the Supreme Court (Perry 1991; Cameron, Segal, and Songer 2000).

accountability, and there is no evidence of an electoral influence on life-tenured judges. Third, judges are immune from *political accountability*. Segal and Spaeth (2002, 94) note that only once has Congress impeached a Supreme Court justice, and removal was unsuccessful. Other, more subtle efforts to politically influence the justices have been rare. Fourth, Supreme Court justices lack further *ambition*. Justices of the modern Court are generally assumed to hold no aspiration for higher office. Although this was not true during the very early years of the Court's existence, it is certainly accurate today. Fifth, because the Supreme Court is *the court of last resort*, the justices do not have to worry about being reversed by a higher judicial authority. While judges of the lower federal courts (and even state supreme courts) must worry about review by the Supreme Court, the High Court itself cannot be reversed, which enables it to behave as its own principal.[15]

At bottom, the attitudinal model is one in which the justices, as in the separation-of-powers model, are in fact assumed to be forward-looking. However, as opposed to the separation-of-powers model, the attitudinal model is one of forward-looking justices who see no credible threats and therefore have no incentive to engage in behavior that incorporates congressional policy preferences (Segal and Spaeth 2002, 92–7). This interpretation of the attitudinal model is different from an interpretation in which the justices are simply not forward-looking. Unfortunately, in the scholarly debate, the subtle distinction between justices who are forward-looking but do not perceive any credible threat of retaliation and justices who are not forward-looking has been blurred. In part due to improper use of terminology and in part due to a lack of theoretical clarity about the assumptions and predictions of the attitudinal model, this distinction has not been made sufficiently prominent in the study of Court–Congress relations. In this book, I adopt what I believe is the best and clearest interpretation of the attitudinal model – one in which the justices are in fact forward-looking but do not perceive a sufficiently large credible threat of congressional response to create any incentive for sophisticated decision making.

[15] Other explanations for the inability of the separation-of-powers model to explain judicial behavior very well include the claim that Congress pays very little attention to the Court, though there is evidence that Congress does pay attention to judicial decisions on issues of salience or importance to the legislature (Pickerill 2004; Hausseger and Baum 1999; Meernik and Ignagni 1997; Ignagni and Meernik 1994; Sala and Spriggs 2004). That is, because the vast majority of cases decided by the Supreme Court are not salient, the Court is able to act on its own policy preferences without concern for potential congressional overrides.

1.1.3 Breakdowns in Judicial Independence

Even though the separation-of-powers model fails to find broad systematic evidence – and the weight of support for the attitudinal model seems to be insurmountable – examples of breakdowns in judicial independence abound. One can point to numerous historical instances where the Court's behavior can best – or perhaps only – be understood as evidence of the Court's inferior institutional position. In substantively important decisions – sometimes in dramatic fashion – the Court has occasionally backed down from its preferred course of action to, apparently, appease political and public sentiment. In cases involving economic regulation during the New Deal (Leuchtenberg 1995, 1969), national security during the Cold War (Pritchett 1961; Murphy 1962), and school busing and prayer during the Republican Revolution (Keynes and Miller 1989), the Supreme Court has apparently capitulated to political and popular pressure. Proponents of the separation-of-powers model have pointed to such examples as evidence that the Court can be constrained by political pressure (Gely and Spiller 1990, 1992; Eskridge 1991*b*; Clinton 1994; Knight and Epstein 1996).

What is missing from these accounts, though, is an empirically measurable condition that can systematically explain when the Court should and should not be responsive to separation-of-powers constraints. Some scholars have proposed that case salience (Hettinger and Zorn 2005) or specific features of the law (Ferejohn and Weingast 1992) may be useful ways to predict when the Court should be more or less constrained by the political checks and balances. I propose, by contrast, a revision of the assumptions that underlie the separation-of-powers model. As I have described it, this line of research assumes that the Court is concerned primarily – frequently only – with policy outcomes. However, I argue that in addition to policy outcomes in individual cases, the Court is also concerned with the institutional integrity of the Court. This is, to be sure, not a novel claim. Other scholars have noted that the Court does act to protect the institution and that public support for, and the prestige of, courts can be an integral factor in separation-of-powers interactions (Vanberg 2005; Stephenson 2004; Staton 2010).

In this vein, Murphy (1962, 62) notes that historically, the "Justices [of the Supreme Court have been] acutely aware of the attacks against their decisions, and they [have been] willing to make concessions when they [feel] that danger [has] become too threatening." Exploring the opposite side of this phenomenon, William Lasser (1988) observes that potentially

controversial Supreme Court decisions have usually been handed down during times when the political majority is sufficiently fractured as to preclude a major political backlash. In reviewing three major Supreme Court crises, Lasser (1988, 262) claims it is instructive that

> The Supreme Court lived through each of its crises not by luck, nor by statesmanship, nor by coincidence. It survived because no one was really trying to kill it. It survived because, when it suffered its "self-inflicted wounds," its opponents had neither the incentive nor the desire to take advantage of its apparently weakened condition, even when they had the power to do so. Scholars have marveled at the Court's ability to survive the fiercest of battles. What they have failed to recognize is that the Court's enemies, for the most part, were shooting blanks.

1.1.4 Judicial Legitimacy and the Separation of Powers

How is the Court able to know when its enemies are "shooting blanks"? How does the Court know when it needs to avoid "self-inflicted wounds"? In analyzing the interaction among the public, Congress, and the Court, this book seeks to demonstrate a systematic way for identifying when the Court should be sensitive to political and popular constraints on judicial power and when we should see judicial independence break down. I present a systematic way for identifying those instances when we will observe the instances of judicial self-restraint that seem to occur and argue that the Court will be more sensitive to its limitations when it is concerned about its institutional legitimacy. As discussed above, institutional legitimacy is an important resource for the Court. A growing body of research has posited that the concern for institutional legitimacy may motivate constrained behavior by courts. That is, fears about losing institutional legitimacy may attenuate the Court's ability to decide cases in isolation of external political pressure (Vanberg 2005; Stephenson 2004; Staton 2010). I explicitly adopt that proposition here. The contribution of my study to this literature will be to investigate both how the Court learns about its institutional legitimacy and how the elected branches in conflict with the courts may use their connection to the public to manipulate the courts' beliefs about their public support.

To be sure, scholars have spent considerable energy investigating judicial legitimacy. In the context of the American Supreme Court, research has mostly focused on the sources of judicial legitimacy. As we will see in greater detail in Chapter 3, this research has led to significant theoretical and empirical developments. Most important for my purposes here, the

literature demonstrates that the Court is concerned about preserving its legitimacy, which involves being sensitive to how the Court is perceived by the public and members of the bar (Baum 2007; Klein and Morrisroe 1999; Epstein and Knight 1998; Staton 2006). Perhaps as a means to this end, we often see that the Court has an incentive to protect its institutional legitimacy by avoiding institutional confrontations and acts on that incentive (Caldeira 1987; Lasser 1988; Hausseger and Baum 1999; Stephenson 2004; Vanberg 2005; Staton and Vanberg 2008; Carrubba 2009; Marshall 2004, 1989*b*; Friedman 2009). That concern for institutional legitimacy, and specifically for reliance on public support to compel compliance with its decisions, can affect judicial decision making is a lesson from this research upon which this book tests. Friedman (2009, 14) summarizes the point nicely:

> In a sense, today's critics of judicial supremacy are right: the Supreme Court does exercise more power than it once did. In another sense, though, they could not be more wrong. The Court has this power only because, over time, the American people have decided to cede it to the justices . . . The tools of popular control have not dissipated; they simply have not been needed.

In the comparative context, this strand of research has been particularly fruitful. Students of judicial institutions abroad have uncovered important examples of judicial behavior apparently motivated by a concern for institutional legitimacy. Some scholarship explicitly incorporates legitimacy into separation-of-powers interactions in the comparative context. Formal models of the separation of powers in other constitutional systems and the European Union incorporate institutional legitimacy into the theory of judicial efficacy (Carrubba 2009; Vanberg 2005; Gibson and Caldeira 1995). I rely directly on the insights of that research for the claim that the perception of judicial legitimacy is a necessary important condition for judicial efficacy. There is also evidence that judges will make an effort to actively shore up their institutional legitimacy by working *with* public opinion (Murphy and Tanenhaus 1990; Staton 2006). I build on these developments by explicitly incorporating institutional legitimacy into the separation-of-powers model. In particular, I demonstrate how the Supreme Court's concern for its legitimacy develops and the conditions under which the Court will be motivated to act to protect that legitimacy. I argue that when the Court is subjected to political criticism and is attacked by legislators, it will become concerned about the state – and future – of its legitimacy.