

## MODELING THE CONGRESSIONAL END-RUN CONSTRAINT

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### I. INTRODUCTION

For over a century law professors and political scientists have shared a commitment to the study of how judges decide cases.<sup>1</sup> Today the subject of judicial decisionmaking continues to hold the focus of some of the most influential scholars in law schools and political science departments.<sup>2</sup>

Despite their common point of study, legal scholars and political scientists have traditionally held deep suspicions about the other's models, data, and ideas.<sup>3</sup> Their mutual distrust is a func-

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1. See generally BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 111 (2010); Nancy Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, in THE PIONEERS OF JUDICIAL BEHAVIOR 1, 5 (Nancy Maveety ed., 2003).

2. See, e.g., LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997); NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); RICHARD A. POSNER, HOW JUDGES THINK (2008); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); Daniel A. Farber, *Earthquakes and Tremors in Statutory Interpretation: An Empirical Study of the Dynamics of Interpretation*, 89 MINN. L. REV. 848 (2005); Keith E. Whittington, *Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601 (2000).

3. See, e.g., FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 151 (2000) (“[F]or decades these two divergent orientations have talked past each other rather than recognize the possible connections between their research agendas.”); Lee Epstein et al., *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783, 783 (2003) (“It has been in only the last few years that law professors have shown much interest in political science approaches to judging . . . .”); Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511, 512 (2007) (“[I]t [is] . . . almost a rite of passage for political

tion of contending assumptions about judicial values and goals. Within political science, scholars of “judicial politics” have tended to assume that judges use their office to maximize the implementation of a broad platform of individual policy preferences.<sup>4</sup> This assumption has been resisted, and in most cases flatly rejected, by the constitutional theorists of the legal academy. Generally speaking, the constitutional theorists have assumed that judges, if policy-driven at all, use their office to promote only those “high” policies concerning the structure, limits, and role of government.<sup>5</sup>

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scientists who study the Court to complain that law professors ignore their work and that the quality of legal scholarship has suffered as a result.”). This distrust revealed itself pronouncedly in the rise of attitudinalism in political science. See Luke M. Milligan, *Congressional End-Run: The Ignored Constraint on Judicial Review*, 45 GA. L. REV. 211, 221–24 (2010). But see Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 262 (2006) (“[L]egal scholars now are pursuing the same sort of empirical inquiries as positive scholars, creating exciting opportunities for true interdisciplinary collaboration.”); Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 876 (2008) (reviewing FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007)) (discussing the “Quantitative Moment” in legal academia).

4. See, e.g., EPSTEIN & KNIGHT, *supra* note 2, at 23 & n.a (discussing how “most justices, in most cases, pursue policy; that is, they want to move the substantive content of law as close as possible to their preferred position” and citing as an example “particular preferences about specific policy questions, such as the drinking age for alcoholic beverages”); J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM* 33 (2004) (characterizing the general approach of judicial politics scholars as “assum[ing] that justices on the Supreme Court compete with members of Congress over *a priori* policy preferences”); Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 203 (2008) (reviewing POSNER, *supra* note 2) (“The sense of the political-science discipline is generally that the Supreme Court Justices ‘should be viewed as promoters of their personal policy preferences rather than as interpreters of law.’” (quoting Howard Gillman, *What’s Law Got To Do with It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 466 (2001))); Adrian Vermeule, *Connecting Positive and Normative Legal Theory*, 10 U. PA. J. CONST. L. 387, 397 n.25 (2008) (“More commonly, political scientists model judges as . . . interested solely in advancing their views of good policy, as opposed to good constitutional law.”). Scholars have used different terms to characterize this subfield of political science. See TAMANAHA, *supra* note 1, at 111 (discussing the shift from “political jurisprudence” to “judicial politics”).

5. See Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1409 (2001) (“Although few legal academics these days are shocked to learn that Justices’ decisions are ‘political’ in the sense that they promote ‘high politics’—larger political principles and ideological goals—they were quite disturbed by the possibility that Justices would use the power of judicial review in so prominent a case to promote the interests of a particular political party . . . .”); see also MALTZMAN ET AL., *supra* note 3, at 150 (“[J]udicial behavioralists and legal scholars each subscribe to a different paradigm. Whereas the former have tended to argue that justices’ behavior stems from their personal policy preferences, the latter question any approach that ignores the role of law.”); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 258 (2005) (“Constitutional theory is all about cabinining law from politics, both to ensure that judges are constrained by law (and thus do not simply vote their own values) and to prevent politics from influen-

This dissonance of assumptions, however, need not impede the realization of interdisciplinary synergies. Many insights relating to judicial decisionmaking can be unhinged from their authors' assumptions about judicial values and, once freed, exported into studies operating upon different assumptions.<sup>6</sup> In a recent work I identified one of these untended synergies.<sup>7</sup> Ignored by political scientists, the "congressional end-run" imposes a unique constraint on the exercise of judicial review by Justices assumed in the judicial politics literature.<sup>8</sup>

The prevailing judicial politics literature holds that there are but two types of congressional constraints on judicial review. First, "curbs" occur when Congress acts to formally limit the Court's authority.<sup>9</sup> Second, "overrides" occur when Congress substitutes its preferred constitutional interpretation for that of the Court.<sup>10</sup> This two-constraint paradigm of judicial politics is nonetheless far from complete. Recent findings from constitutional theory (most notably the inventory of mitigating legislative responses cited by Professors Devins, Stuntz, and Farber),<sup>11</sup> when freed from their authors' assumptions about judicial values, reveals a third type of congressional constraint that has been overlooked by judicial politics scholars.<sup>12</sup> This third constraint, termed the "end-run," occurs when Congress mitigates the costs of adverse judicial review by neither limiting the Court's authority nor substituting its constitutional interpretation for that of the Court, but by a different decision which cannot, as a practical if not legal matter, be invalidated by the Court.<sup>13</sup> Examples include congress-

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cing law.").

6. See generally Mitu Gulati et al., *Evaluating Judges and Judicial Institutions: Reorienting the Perspective* (Working Paper, Feb. 23, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1561662](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561662) (calling on judicial politics scholars to "read[ ] theorists and judges closely and design[ ] studies specifically to test their ideas or address their concerns").

7. Milligan, *supra* note 3, at 213–215 (identifying the "congressional end-run").

8. *Id.*

9. *Id.* at 233–36 (discussing the manner in which curbing constrains judicial review).

10. *Id.* at 236–41 (discussing the manner in which an override constrains judicial review).

11. *Id.* at 245–58 (discussing DEVINS & FISHER, *supra* note 2; Daniel A. Farber, *Legislative Constitutionalism in a System of Judicial Supremacy*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 431 (Richard W. Bauman & Tsvi Kahana eds., 2006); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1 (1997)).

12. Milligan, *supra* note 3, at 258–63.

13. *Id.* at 260.

sional decisions to adjust appropriations, amend “contingent” rules, reorient the constitutional bases for invalidated legislation in alternate clauses, or modify grants of authority to the executive branch.<sup>14</sup>

To illustrate the constraining role of congressional end-runs, assume a strategic Justice who seeks to use his position to advance a broad platform of individual policy preferences. Further assume (1) that the Court granted certiorari on the issue of whether the Sixth Amendment right to counsel for indigent defendants extends to hearings for the repeal of welfare benefits, and (2) that our Justice would prefer, as a matter of attitude or ideology, to rule for the claimant. Congress (and perhaps state legislatures) can nonetheless constrain our Justice from voting for his sincere preference by suggesting that it will respond to any new constitutional “tax” on welfare benefits by producing less welfare (i.e., reducing or altogether eliminating related welfare programs). A congressional adjustment of appropriations, for the purpose of mitigating the costs of complying with an adverse Sixth Amendment ruling, constitutes an end-run. At some point the expected costs of this end-run (from the Justice’s perspective) will become high enough to cause the Justice to deviate from his preferred decision-point to one more aligned with congressional preferences.<sup>15</sup> This simple hypothetical illustrates how Congress can successfully constrain an exercise of judicial review without resorting to a curb (formally limiting the Court’s authority) or an override (substituting its preferred interpretation for that of the Court).

Building on my previous work,<sup>16</sup> this article provides a more formal demonstration of the unique constraining effect of the end-run. It proceeds in two parts. Part II reviews the congressional end-run, describing its origins in constitutional theory studies, and explaining that it has been overlooked by judicial politics scholars. Part III, the heart of the article, incorporates the end-run into a formal theoretical model of judicial decisionmaking. This revised model reveals that the prevailing strategic models of judicial politics (which have worked within the two-constraint pa-

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14. *Id.* at 258–59.

15. *See infra* Part II.D.

16. *See* Milligan, *supra* note 3, at 258–63 (identifying the phenomenon of the congressional end-run).

radigm) have systematically underestimated the degree to which their assumed Justices are constrained by Congress. The article concludes by calling on judicial politics scholars to amend their formal models and redesign their empirical studies to account for the constraining role of the congressional end-run.

## II. CONSTRAINTS ON DECISIONMAKING

Overlooked by political scientists, the end-run is the third type of congressional constraint on the exercise of judicial review by Justices assumed in the judicial politics literature. The following paragraphs describe the prevailing judicial politics literature, explain how it can be enhanced by recent studies in constitutional theory, define the “congressional end-run,” and survey Supreme Court case law for evidence that Justices are aware of end-runs.

### A. *Theoretical Backdrop: Attitudinalism and the Strategic Model*

The field of judicial politics rests on an attitudinal-strategic divide. The attitudinal wing claims that Justices use their office to advance a broad platform of policy preferences and that Justices vote their “sincere” preferences.<sup>17</sup> The strategic wing adopts the first attitudinal claims (that Justices seek to implement a broad policy platform) but challenges the claim that Justices vote sincerely.<sup>18</sup> The strategic model argues the Justices realize constraints on their ability to implement policy (most notably those imposed by Congress, the Executive, and interpreting courts),

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17. By “broad” I mean to say not only those “high” policy preferences regarding the structure and role of government, but also “particular preferences about specific policy questions,” which would extend to more pedestrian and local matters “such as the drinking age for alcoholic beverages.” EPSTEIN & KNIGHT, *supra* note 2, at 23 n.a. See generally PICKERILL, *supra* note 4, at 33 (observing that the general approach in judicial politics models “assumes that justices on the Supreme Court compete with members of Congress over *a priori* policy preferences”); Cross, *supra* note 4, at 203 (“The sense of the political-science discipline is generally that the Supreme Court Justices ‘should be viewed as promoters of their personal policy preferences rather than as interpreters of law.’” (quoting Howard Gillman, *What’s Law Got To Do with It? Judicial Behaviorists Test the “Legal Model” Of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 466 (2001))). For a discussion of why Justices vote sincerely, see, for example, Jeffrey A. Segal, *Supreme Court Deference to Congress: An Examination of the Marksist Model*, in SUPREME COURT DECISION-MAKING 237, 240 (Cornell W. Clayton & Howard Gillman eds., 1999).

18. Brian R. Sala & James F. Spriggs, II, *Designing Tests of the Supreme Court and the Separation of Powers*, 57 POL. RES. Q. 197, 199 (2004) (“The [Separation of Powers] Game simply adds a legislative bargaining subgame to the Attitudinalist Game.” (emphasis omitted)).

and modify their decisionmaking accordingly.<sup>19</sup> As Professor Baum observed, “[j]udges who vote strategically take into account the effects of their choices on collective results when they vote on outcomes and write or support opinions. . . . Because of this motivation, the positions they take may differ from the positions that they most prefer.”<sup>20</sup> These constraining institutions “mediate between preferences and outcomes by affecting the justices’ beliefs about the consequences of their actions.”<sup>21</sup> And so the strategic model (alternatively referred to as the separation-of-powers (“SOP”) model) can be understood as comprising three core tenets. First, Justices seek to use their office to implement a broad platform of policy preferences.<sup>22</sup> Second, Justices realize their ability to implement policy is constrained.<sup>23</sup> Lastly, Justices are prepared to “game” their judicial votes accordingly.<sup>24</sup> The following section elaborates on the state of the literature on the strategic model.

### B. *Judicial Politics*

A substantial share of the SOP literature has centered on how Congress impacts judicial decisionmaking.<sup>25</sup> While the literature’s terminology has, over the decades, been neither uniform nor precise, my research reveals that the congressional constraints on judicial review identified by judicial politics scholars can be classified as either “curbs” or “overrides.”<sup>26</sup>

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19. See, e.g., EPSTEIN & KNIGHT, *supra* note 2, at 10 (“[A strategic] account [of judicial decisions] rests on a few simple propositions: justices may be primarily seekers of legal policy, but they are not unconstrained actors who make decisions based on their own ideological attitudes. Rather, justices are strategic actors who realize that their ability to achieve goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act.”); Whittington, *supra* note 2, at 611 (stating that judges “may need to act strategically, in the sense of understanding and anticipating the likely responses of others to the judge’s own actions” (emphasis omitted)).

20. BAUM, *supra* note 2, at 90.

21. MALTZMAN ET AL., *supra* note 3, at 14.

22. Milligan, *supra* note 3, at 224.

23. *Id.* at 224–25.

24. *Id.* at 225–26.

25. *Id.* at 229–42.

26. Professor Stumpf is generally credited as having founded the two-constraint paradigm. See Harry P. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377, 382 (1965) (designating these as “two basic types of legislative responses”); see also Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971 (2009). For a more elaborate discussion on this point, see Milligan, *supra* note 3, at 232 n.82.

Curbs are formal legislative enactments that limit the power or independence of the Court.<sup>27</sup> Along these lines, Gerald Rosenberg helpfully identified “ten types of proposals that have been made to limit the power of the Court or demonstrate congressional displeasure,”<sup>28</sup> including:

- (1) using the Senate’s confirmation power to select certain types of judges; (2) enacting constitutional amendments to . . . change Court structure or procedure; (3) impeachment; (4) withdrawing Court jurisdiction over certain subjects; (5) altering the selection and removal process; (6) requiring extraordinary majorities for declarations of unconstitutionality; (7) allowing appeal from the Supreme Court to a more “representative” tribunal; (8) removing the power of judicial review; (9) slashing the budget; (10) altering the size of the Court.<sup>29</sup>

Professor Rosenberg’s list has been supplemented over the years. More recently recognized curbs include decisions to freeze judicial salaries,<sup>30</sup> lower staff funding,<sup>31</sup> require circuit duty,<sup>32</sup> collect information about disfavored judges,<sup>33</sup> and “specify[ ] the number of votes needed to exercise the power of judicial review.”<sup>34</sup>

Curbs are not the only congressional constraint emphasized by judicial politics scholars. Congress also has the power to influence judicial review by threat of an “override.” An override occurs when “Congress substitute[s] its own constitutional interpretation for that of the Court.”<sup>35</sup> Overrides are generally thought to come in two forms. Congress can initiate a constitutional amendment,<sup>36</sup> or alternatively, disregard, by act or omission, the

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27. Milligan, *supra* note 3, at 233; Stumpf, *supra* note 26, at 382.

28. Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 376 (1992).

29. *Id.* at 377 (emphasis omitted).

30. Congress cannot lower judicial salaries, but it can freeze them to let inflation accomplish the same end. See Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT’L J. CONST. L. 446, 449 (2003).

31. *Id.*

32. *Id.*

33. In recent years, Congress has investigated and threatened to publish the names of judges who depart downward from the sentencing guidelines. See Editorial, *Blacklisting Judges*, N.Y. TIMES, Aug. 10, 2003, at WK10.

34. Whittington, *supra* note 30, at 449.

35. PICKERILL, *supra* note 4, at 32; see also Milligan, *supra* note 3, at 236. The override has been alternatively referred to as “decision reversal.” See, e.g., Stumpf, *supra* note 26, at 382.

36. See U.S. CONST. art. V; PICKERILL, *supra* note 4, at 7–48 (describing Congress’s passage and the states’ ratification of the Twenty-Sixth Amendment in response to the Court’s invalidation of the Voting Rights Act of 1970 in *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

Court's interpretation.<sup>37</sup> This second type of override calls to mind Alexander Hamilton's observation that the judiciary "may truly be said to have neither FORCE nor WILL but merely judgment."<sup>38</sup> For an example of an override one might recall Congress's regular use of the legislative veto after the Court's ruling in *INS v. Chadha*.<sup>39</sup>

As it stands the prevailing SOP studies on Congress's role in judicial review are inconclusive.<sup>40</sup> On the one hand, the literature strongly suggests that Justices do in fact deviate from their facial policy preferences in some base percentage of cases.<sup>41</sup> Yet on the other hand, leading judicial politics scholars remain skeptical

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37. See EPSTEIN & KNIGHT, *supra* note 2, at 144 ("[G]overnment actors can refuse, implicitly or explicitly, to implement particular constitutional decisions, thereby decreasing the Court's ability to create efficacious policy."); J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 11 (1968) ("Indeed, if the Court is too far out of touch with the people, the Congress and the executive can annul its directives simply by refusing to execute them . . .").

38. THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003); see also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 21 (2d ed. 2008) (stating that a decision too far out of the political mainstream "may amount to little more than 'a teasing illusion like a munificent bequest in a pauper's will'" (quoting *Edwards v. California*, 314 U.S. 160, 186 (1941))).

39. See PICKERILL, *supra* note 4, at 149 ("Congress appears to have ignored the Court's holding [in *Chadha*] in a number of statutes."); Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. & CONTEMP. PROBS. 273, 288 (1993) ("Congress continued to add legislative vetoes to bills and Presidents . . . continued to sign them into law. From the date of the Court's decision in *Chadha* to the end of the 102nd Congress . . . Congress enacted more than two hundred new legislative vetoes. Most of these require the executive branch to obtain the approval of [a] specified committee[ ]. . ."). For discussion of additional congressional attempts to override judicial review, see Louis Fisher, *Congressional Checks on the Judiciary*, in CONGRESS CONFRONTS THE COURT: THE STRUGGLE FOR LEGITIMACY AND AUTHORITY IN LAWMAKING 21, 28–29 (Colton C. Campbell & John F. Stack Jr. eds., 2001) (discussing bills introduced following *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) and *United States v. Darby*, 312 U.S. 100 (1941)), and Stumpf, *supra* note 26, at 378–81 (analyzing congressional legislation in the wake of *Baker v. Carr*, 369 U.S. 186 (1962)).

40. See Milligan, *supra* note 3, at 241–42.

41. See TAMANAHA, *supra* note 1, at 112 ("[R]ecent quantitative studies of judging . . . comport far more closely with what judges say about judging than with the positions taken by judicial politics scholars."); Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1150 (2004) (comparing the prediction accuracy rates of legal experts (59.1%) with that of a statistical model (75%)); Charles Gardner Geyh, *Judicial Politics, the Rule of Law and the Future of an Ermine Myth* 21 (Ind. Univ. Maurer Sch. of Law—Bloomington, Legal Studies Research Paper Series, Research Paper No. 165, Apr. 2010), available at <http://ssrn.com/abstract=1598454> (summarizing quantitative studies of the Supreme Court as generally affirming the attitudinal model but recognizing "important nuances").



about the constraining role of curbs and overrides.<sup>42</sup> While findings of deviation from facial policy preferences can be a function of any number of factors (miscoding of judicial preferences, judicial fidelity to precedent, judicial concern for public consensus, etc.), it is certainly possible that part of this deviation can be attributed to congressional constraints other than curbs or overrides.

### C. *Constitutional Theory*

Gazing beyond the confines of the judicial politics literature to recent developments in constitutional theory, one can identify a third, heretofore ignored, congressional constraint on the exercise of judicial review by the Justices assumed in judicial politics studies. Over the past fifteen years, several constitutional theorists have inventoried the various methods by which legislatures respond to unwelcomed judicial review. Louis Fisher and Neal Devins have identified the phenomenon of congressional “signals,”<sup>43</sup> William Stuntz has discussed the role of “substantive criminal law” on constitutional criminal procedure,<sup>44</sup> and Daniel Farber has analyzed the “mitigating mechanisms” available to Congress.<sup>45</sup> Of the legislative responses cited in these studies, six are of particular relevance to the judicial politics scholar. These are legislative decisions to modify:

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42. See MALTZMAN ET AL., *supra* note 3, at 4 (“[W]e know little about how frequently or under what conditions justices are prone to play this strategic game.”); Sala & Spriggs, *supra* note 18, at 204–05 (stating that “no . . . evidence has yet to emerge for the separation of powers game”); *id.* at 197 (“[C]onvincing empirical support for a checks-and-balances constraint on justices’ choices has been . . . elusive, however.”); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 35 (1997) (“[W]hile ardent adherents argue that the separation-of-powers model has been theoretically and empirically verified . . . the evidence is far from convincing.”).

43. See NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE* (1996) (analyzing interaction between the Court, elected government, and the American people); DEVINS & FISHER, *supra* note 2, at 42 (“Once the Supreme Court decides a case, Congress may use a wide variety of powers to signal its approval or disapproval.”). Examples of signals include funding decisions and legislation that mitigates the policy costs of particular decisions.

44. See Stuntz, *supra* note 11, at 4.

45. See Farber, *supra* note 11, at 435–41.

- (1) appropriations,<sup>46</sup>
- (2) contingent laws,<sup>47</sup>
- (3) the constitutional bases for legislation,<sup>48</sup>
- (4) grants of executive authority,<sup>49</sup>
- (5) legislative rights,<sup>50</sup> and
- (6) legislation concerning state regulation of commerce.<sup>51</sup>

The studies which identified these legislative responses did not, however, suggest they were “constraints” on judicial decisionmaking. The authors of such studies, after all, assumed that Justices are either: (1) not strategic, or (2) strategic only under those exceptional circumstances when necessary to preserve their interpretive primacy (i.e., their ability to form policy through future exercises of judicial review).<sup>52</sup> Yet when one replaces the authors’ underlying assumptions about judicial values with those of judicial politics scholars, these six legislative responses can be neatly reframed as “constraints” on judicial review.<sup>53</sup> Interestingly, these constraints are neither curbs (as they do not formally limit the Court’s authority) nor overrides (as they do not substitute the legislature’s interpretation for that of the Court). The following paragraphs describe the constraining effect of these legislative responses.

#### D. *The End-Run Constraint*

Recent studies in constitutional theory hint at congressional constraints on judicial review falling outside of the two-constraint

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46. See Stuntz, *supra* note 11, at 4.

47. See Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143 (2009) (discussing contingent rules); Stuntz, *supra* note 12, at 7.

48. See Farber, *supra* note 11, at 440.

49. See *id.* at 438 (citing *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring)).

50. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 32 (1994); Farber, *supra* note 11, at 435.

51. See Farber, *supra* note 11, at 440–41; Richard A. Paschal, *Congressional Power to Change Constitutional Law: Three Lacunae*, 77 U. CIN. L. REV. 1053, 1056–57 (2009) (discussing Congress’s supremacy in constitutional issues involving sovereign immunity under the Eleventh Amendment and intergovernmental tax immunity for both state and federal governments).

52. See Milligan, *supra* note 3, at 259.

53. See *id.* at 259–60 (describing how a Justice looking to maximize the implementation of a broad policy platform will be constrained by possible expected congressional responses).

paradigm of judicial politics.<sup>54</sup> For the sake of clarity these constraints can be bundled into a type of constraint termed the “end-run.” The congressional end-run has been defined as follows:

Congress mitigates the policy costs of adverse judicial review through neither formal limits on the Court’s autonomy nor substitution of its constitutional interpretation for that of the Court, but through a different decision which cannot, as a practical if not legal matter, be invalidated by the Court.<sup>55</sup>

The definition of the congressional end-run is limited in two important ways. The first is by the term “different decision.” This term excludes congressional decisions to curb or override. The second limitation is that end-runs must be insulated, as a practical if not legal matter, from being invalidated.<sup>56</sup> The concept of “insulation” excludes congressional decisions to (1) defiantly reenact invalidated legislation, or (2) enact legislation that purports to simply correct the precise constitutional defects identified by the Court.<sup>57</sup> After all, neither type of congressional response is insulated from a second round of adverse judicial review.

The six legislative responses in subpart C can be classified as “end-runs.” First, each mitigates the costs of adverse judicial re-

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54. *See id.* at 245–58.

55. *Id.* at 260.

56. It is worth emphasizing that “insulated” does not mean “immune.” By “insulated,” I simply mean that adverse judicial review will be extraordinarily expensive for the Court. For example, consider a congressional decision to repeal a particular welfare program. As stated above, such a decision is generally insulated from being invalidated. But by this I do not necessarily mean that the Court *cannot* invalidate the decision. Rather, I mean that the Court *will not* invalidate the decision. After all, such flagrant disregard for text, precedent, and legal norms would almost certainly invite a congressional override or curb. The point here is that by “insulated” I mean to suggest a practical—if not necessarily legal—freedom from adverse judicial review. *See, e.g.,* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 31 (1964) (“[E]ven a judge who had little respect for technical law-court rules would find it prudent to assume such respect before some of the popular, bureaucratic, or political checks were applied against his tribunal.”).

57. *See* WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 153 (1962) (describing congressional attempts to verify the Court’s reaction to post-*Jencks* legislation); *id.* at 134 (quoting S. REP. NO. 981, *reprinted in* 1957 U.S.C.C.A.N. 1861, 1862) (stating that the bill “is not designed to nullify, or to curb, or to limit the decision of the Supreme Court . . . [but] reaffirms the decision”); GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 4–5 (2005) (describing the *Bundestag*’s reaction to the German Federal Constitutional Court’s campaign finance decisions); *see also* *United States v. Palermo*, 258 F.2d 397, 400 & n.6 (2d Cir. 1958) (agreeing with committee report and upholding *Jencks* legislation). It is not unusual for the Court to forecast the constitutionality of potential congressional modifications. *See generally* *Greene v. McElroy*, 360 U.S. 474 (1959); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

view. Second, none formally limits the authority of the Court nor substitutes Congress's interpretation for that of the Court. Third, each is generally insulated from judicial review. Typical congressional decisions to modify appropriations, grants of authority to the executive branch, or legislation concerning state regulation of commerce run virtually no risk of being invalidated by the Court.<sup>58</sup> And, depending on the state of precedent at a given moment, Congress retains broad discretion to modify, without concern of adverse judicial review, certain contingent laws, legislative rights, or the constitutional bases for invalidated legislation.

It is important to explain briefly how judicial review can trigger a congressional end-run. Take a situation where the Court is faced with a decision whether to extend the constitutional exclusionary rule to arrests that violate a statutory limit on arrest power (such as a jurisdictional limit) but nonetheless meet the constitutional requirement that arrests be based on probable cause that a crime was committed.<sup>59</sup> If the Court decides to side with the defendant, it will effectively impose a new "exclusionary tax" on state laws limiting arrest powers.<sup>60</sup> Such a tax would eliminate one of the "moderate" blocs of the state legislature (i.e., those legislators who support limits on arrest powers but are unwilling to punish excesses with an exclusionary sanction).<sup>61</sup> The exclusionary tax, when imposed by the Court, necessarily flushes the legislative moderates out into either a more liberal or conservative bloc.<sup>62</sup> Should a sufficient number of these legislative moderates defect to a more conservative bloc, then the related state laws saddled with an exclusionary tax will be repealed.<sup>63</sup>

End-runs undoubtedly constrain the exercise of judicial review by the strategic Justices assumed in the judicial politics litera-

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58. See ROSENBERG, *supra* note 38, at 18 (stating that judges are "not in a particularly powerful position to successfully order the other branches to expend additional funds"); Symposium, *The Right to Treatment*, 57 GEO. L.J. 673, 676 (1969) ("[T]he real problem is one of inadequate resources, which the courts are helpless to remedy . . ."). But see *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 232 (1964) (finding that "the perpetuation of racial segregation by closing public schools and operating only segregated schools supported directly or indirectly by state or county funds" violated the Equal Protection Clause).

59. This was the issue before the Court in *Virginia v. Moore*, 553 U.S. 164 (2008). In *Whren v. United States*, 517 U.S. 806 (1996), the Court distinguished "illegal" arrests from "unconstitutional" arrests.

60. See Milligan, *supra* note 3, at 264.

61. See *id.*

62. See *id.*

63. *Id.*

ture (i.e., Justices looking to maximize the implementation of broad policy platforms). Such Justices will incorporate the expected costs of adverse end-runs into their voting calculus on judicial review.<sup>64</sup> And at some point the expected costs of end-runs become sufficiently high to cause these Justices to deviate from their ideological vote to one more aligned with congressional preferences.<sup>65</sup> Returning to the illustration involving the exclusionary tax, a strategic Justice looking to maximize the implementation of a liberal public policy agenda will, at some point, compromise his preferred decision-point (which would have expanded the exclusionary rule) in order to avoid triggering a legislative repeal of underlying arrest regulations. This illustrates how Congress can effectively constrain the exercise of judicial review—not through a curb or override—but through a congressional end-run.

Judicial awareness of end-runs is, of course, a necessary condition to any claim that end-runs constrain judicial decisionmaking. Judicial anticipation of end-runs has yet to be studied empirically, but a brief glance back through Supreme Court case law makes clear that Justices understand the legislative power to end-run. This awareness has manifested itself most frequently in warnings about forcing legislatures into “all-or-nothing” dilemmas.<sup>66</sup> While examples are plentiful, Justice Black’s dissent in *Goldberg v. Kelly* is certainly worth a mention here:

Since this process will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full “due process” proceeding, it will also have insured that many will never get on the rolls, or at least

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64. In a previous article I explained that end-runs constrain judicial review as follows: “A Level-1 Justice will compromise his preferred vote on judicial review to avoid triggering an end-run he perceives to be sufficiently disruptive of his broad policy platform.” *Id.* at 260.

65. *See id.*

66. *Id.* at 266–69. Looking beyond the case law one finds similar concerns raised by Justices in commentary. *See, e.g.,* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) (“If the Supreme Court insists on limiting the content of due process to the rights created by state law, state courts can breathe new life into the federal due process clause by interpreting their common law, statutes and constitutions to guarantee a ‘property’ and ‘liberty’ that even the federal courts must protect.”).

that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.<sup>67</sup>

For a more recent example, one might consider the observations of Justice Scalia, writing for eight Justices in *Virginia v. Moore*:

Moore would allow Virginia to accord enhanced protection against arrest only on pain of accompanying that protection with federal remedies for Fourth Amendment violations, which often include the exclusionary rule. States unwilling to lose control over the remedy would have to abandon restrictions on arrest altogether. This is an odd consequence of a provision designed to protect against searches and seizures.<sup>68</sup>

Focusing exclusively on curbs and overrides, SOP studies on the role of Congress in judicial review have operated within a two-constraint paradigm. But end-runs—which are neither curbs nor overrides—undoubtedly constrain (at least as a theoretical matter) the exercise of judicial review by Justices assumed in the judicial politics literature. In order to facilitate study of the constraining force of the end-run, the next Part incorporates the end-run into a formal theoretical model of judicial decisionmaking.

### III. A REVISED MODEL OF JUDICIAL DECISIONMAKING

The judicial politics literature on Congress's role in judicial review remains inconclusive. This uncertain state can be attributed, in part, to its disregard of the congressional end-run. To help incorporate the end-run into judicial politics this Part puts forth a formal theoretical model of the end-run. The model demonstrates how prevailing SOP models systematically underestimate Congress's influence on the exercise of judicial review by the Justices assumed in judicial politics studies.

#### A. *Operative Assumptions*

Judicial politics models of decisionmaking share certain assumptions. First, every legal issue before the Court can be resolved along a spectrum of "decision-points." Second, Justices seek to maximize broad platforms of individual policy preferences. Third, a given decision-point can have both direct and col-

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67. 397 U.S. 254, 279 (1970) (Black, J., dissenting) (arguing that the Constitution does not ensure process rights for the withdrawal of elective welfare benefits).

68. 553 U.S. 164, 174 (2008).

lateral effects on a policy platform. Based on these assumptions, one realizes a general formula for a decision-point's "Expected Net Impact" (from the perspective of the voting Justice):

$$\textit{Expected Net Impact} = \textit{Expected Direct Impact} + \textit{Expected Collateral Impact}$$

Because it is possible that a given decision of the Court will not be fully implemented, "Expected Direct Impact" is best understood as the product of "Direct Impact of Implementation" (i.e., the policy effects demanded from the face of the decision) and "Chance of Decisional Implementation." Moreover, because not every decision of the Court will trigger a collateral response, "Expected Collateral Impact" should be understood as the product of "Impact of Collateral Response" and "Chance of Collateral Response." Our general formula for a decision-point's "Expected Net Impact" can therefore be restated as follows:

$$\textit{Expected Net Impact} = (\textit{Direct Impact of Implementation}) (\textit{Chance of Implementation}) + (\textit{Impact of Collateral Response}) (\textit{Chance of Collateral Response})$$

To illustrate this formula one can mark the various decision-points of judicial review along an  $X$ -coordinate. The 0-value represents the status quo (i.e., upholding the legislation), and each unit along the  $X$ -coordinate marks a decision-point of equal deviation from the status quo. The  $Y$ -coordinate, on the other hand, reflects the "Expected Net Impact" (measured in utils from the perspective of the voting Justice) of a given decision-point ( $X$ ). Thus, one can restate the general formula for "Expected Net Impact" as follows:

$$Y = (\textit{Direct Impact of X's Implementation}) (\textit{Chance of X's Implementation}) + (\textit{Impact of Collateral Response to X}) (\textit{Chance of Collateral Response to X})$$

The following paragraphs utilize this general formula of "Expected Net Impact" to contrast the judicial behavior of the attitudinal and strategic Justices assumed by judicial politics scholars.

### B. Attitudinal Utility

This subpart implements the general formula of "Expected Net Impact" to illustrate the decisionmaking of attitudinal Justices.

The attitudinalist, remember, believes that Justices seek to maximize a broad platform of policy preferences and that they cast votes in a sincere manner.<sup>69</sup> In other words, the attitudinal Justice, when considering the costs and benefits of a particular decision-point, does not worry about Court majorities, external obstructions, or collateral responses. Returning to our general formula of “Expected Net Impact” one can identify two key assumptions of the attitudinalist Justice:

$$\begin{aligned} \text{Chance of } X\text{'s Implementation} &= 1 \\ \text{Chance of Collateral Response to } X &= 0 \end{aligned}$$

By incorporating these assumptions into our general formula, one can restate the utility formula for an attitudinal Justice ( $Y_a$ ) as follows:

$$Y_a = (\text{Direct Impact of } X\text{'s Implementation}) (1) + (\text{Impact of Collateral Response to } X) (0)$$

This can be further restated as:

$$Y_a = \text{Direct Impact of } X\text{'s Implementation}$$

As an example, assume that an attitudinal Justice gains 10 utils of satisfaction for every 1-point positive deviation from the policy status quo. Based on such assumption one realizes the formula for this attitudinalist Justice's utility is:

$$Y_a = 10X$$

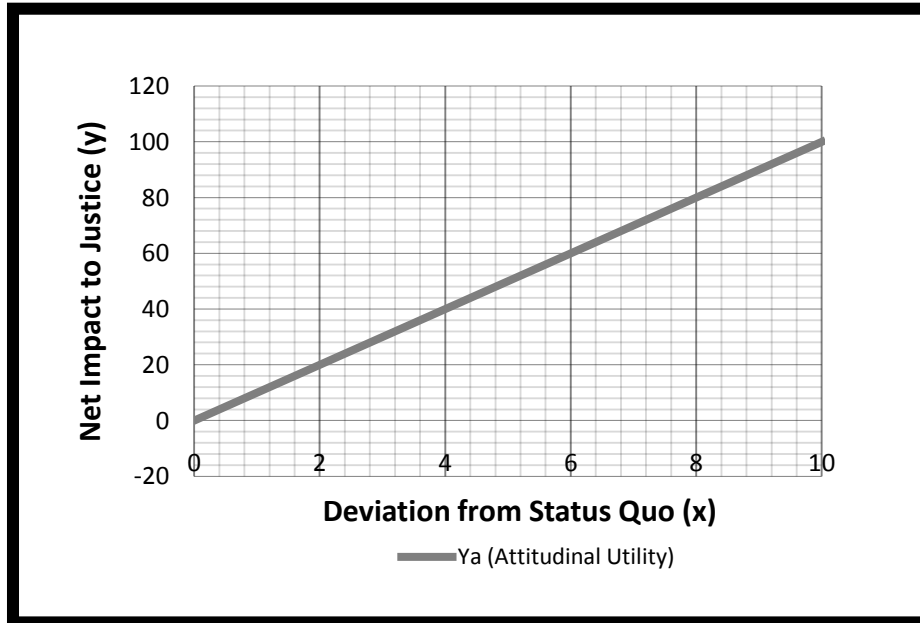
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69. See *supra* note 17 and accompanying text. The attitudinal Justice is bothered by neither external constraints nor internal constraints. Without care for internal constraints (such as the need to build a majority coalition), the perceived impact of a decision-point will not be discounted by such Justices on the grounds that it will not win the support of the Court's majority.



Figure 1 illustrates this utility formula:

Figure 1



The assumption of gaining 10 utils per 1-point positive deviation is, of course, an arbitrary one. An attitudinal Justice could just as well value the implementation of the status quo (i.e., upholding the reviewed legislation) above all things. If that were the case, the attitudinalist's utility curve would look very different (as it would have, among other things, a negative slope).<sup>70</sup>

### C. Strategic Utility

Unlike the attitudinalists, adherents to the strategic model claim that Justices will deviate from their preferred decision-points to accommodate certain institutional constraints on their ability to implement policy preferences. Because this article focuses on Congress's role in judicial review, our modeling of strategic behavior from this point forward will operate on the premise

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70. The Y-value at the status quo could be framed as 0 or as some positive value. No matter how it is framed, the slope will be negative.

that voting Justices contemplate neither internal constraints (such as building Court majorities) nor those external constraints not emanating from Congress.<sup>71</sup>

As discussed in Part II, the prevailing SOP literature recognizes two congressional constraints on judicial review: curbs and overrides.<sup>72</sup> Put differently, the strategic Justice believes there are some decision-points that will trigger a congressional limit on the Court's authority (curb) and some decision-points which will cause Congress to substitute its interpretation for that of the Court (override). And so while the attitudinalist assumes that "Chance of Collateral Response to  $X$ " is 0, and "Chance of  $X$ 's Implementation" is 1, both of these elements are variable for the strategist. The following sections illustrate how the possibility of congressional curbs and overrides impact the utility curve of the strategic Justice assumed by judicial politics scholars.

### 1. Curbing Measures

The ensuing paragraphs seek to isolate how the congressional curbing constraint affects a strategic Justice's utility curve. To do so, it is helpful to assume a universe where congressional curbs are the only available constraints on judicial review. Remember the general formula for "Expected Net Impact":

$$Y = (\text{Direct Impact of } X\text{'s Implementation}) (\text{Chance of } X\text{'s Implementation}) + (\text{Impact of Collateral Response to } X) (\text{Chance of Collateral Response to } X)$$

A congressional curbing measure is a formal limitation on the Court's authority.<sup>73</sup> It does not, however, obstruct the implementation of the triggering judicial decision. Therefore the "Chance of  $X$ 's Implementation," in a curb-only universe, is fixed at 1. Because in the previous subpart it was established that "Direct Impact of  $X$ 's Implementation" is signified by  $Ya$ , the "Expected Direct Impact" of a decision ( $X$ ), in a curb-only universe, is  $Ya$ . Yet to measure a decision-point's "Expected Net Impact," its "Ex-

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71. And so our assumed Justices contemplate neither internal constraints nor external constraints emanating from lower courts, the states, or the executive branch. This effectively means that any potential vote by the Justice will necessarily become the holding of the Court (as there are no internal constraints on the Justice).

72. See *supra* Part II.B.

73. See *supra* notes 27–34 and accompanying text.

pected Direct Impact” must be, of course, aggregated with its “Expected Collateral Impact.”

As discussed above, “Expected Collateral Impact” is the product of “Impact of Collateral Response to  $X$ ” and “Chance of Collateral Response to  $X$ .” A curb is a collateral response. Although curbs come in various forms, any *particular* form of curb has, from a Justice’s perspective, a fixed impact. While “Impact of Collateral Response” (signified in our model by  $C$ ) is fixed in a curb-only universe, the “Chance of Collateral Response” (signified by  $Z$ ) is variable.

This  $Z$ -value is a function of the Justices’ decision-point ( $X$ ): the greater the deviation from the status quo, *ceteris paribus*, the greater the  $Z$ -value (i.e., the more likely Congress will respond with a curb). Thus, in a curb-only universe, the “Expected Collateral Impact” of a decision-point is the product of a fixed  $C$  and variable  $Z$ . And so, the utility formula for a strategic Justice in a curb-only universe ( $Yc$ ) can be stated as follows:

$$Yc = (Ya)(1) + (C)(Z)$$

Because  $C$  represents the impact of a curb, and the impact of a curb on a Justice’s policy preferences is almost always a negative one (i.e., a cost),  $C$  can be represented, for the sake of clarity, as a negative integer.<sup>74</sup> The formula for  $Yc$  can therefore be restated as follows:

$$Yc = Ya - (C)(Z)$$

As a result, a strategic Justice (in a curb-only universe) will prefer a decision-point of  $X1$  to  $X2$  when:

$$[Ya_{x1} - (C)(Z_{x1})] > [Ya_{x2} - (C)(Z_{x2})]$$

And he will prefer a decision-point of  $X2$  to  $X3$  when:

$$[Ya_{x2} - (C)(Z_{x2})] > [Ya_{x3} - (C)(Z_{x3})]$$

As mentioned above, the  $Z$ -value (i.e., the chance of a curb) is a function of congressional preferences. Such preferences can be represented along a curbing demand curve. Where the  $X$ -coordinate represents decision-points of judicial review, and the

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74. This is generally, though not always, a negative number. It could be positive, for instance, if a Justice’s platform was aligned with the legislature’s preferences, and at odds with the preferences of his colleagues on the Court. He would, under these circumstances, just as soon have Congress curb the Court’s authority in a certain policy area.

$Y$ -coordinate represents the chance of curb ( $Z$ ), a curbing demand curve will always be comprised of three general sections. In any given instance of judicial review, one category of decision-points will constitute sufficiently minor deviations from the status quo such that there is zero chance of a resulting curb. For all such decision-points,  $Z$  equals 0.<sup>75</sup> A second category of decision-points may trigger a curb. For all such decision-points,  $Z$  is between 0 and 1. And a third category of decision-points, constituting sufficiently major deviations from the status quo, will trigger a curb. For all such decision-points  $Z$  equals 1.<sup>76</sup>

So how does a strategic Justice measure  $Z$ ? He does so by estimating the largest deviation from the status quo that cannot trigger a curb ( $Zmin$ ), and by estimating the smallest deviation from the status quo that will necessarily trigger a curb ( $Zmax$ ).  $Z$  equals 0 at all deviations less than  $Zmin$ , and  $Z$  equals 1 at all deviations larger than  $Zmax$ . For any deviation between  $Zmin$  and  $Zmax$ , the  $Z$ -factor is calculated by dividing the difference between the given deviation and  $Zmin$  by the difference between  $Zmax$  and  $Zmin$ .<sup>77</sup> In other words, the "Chance of Collateral Response" in a curb-only universe for a decision-point ( $X$ ) falling between  $Zmin$  and  $Zmax$  is as follows:

$$Z = [(X - Zmin) / (Zmax - Zmin)]$$

As an example, assume a Justice estimates  $Zmin$  at 4 and  $Zmax$  at 6. Then the  $Z$ -factor of a decision-point of 5 would equal 0.5. The following graph, Figure 2, illustrates the congressional demand for curbing based on these assumptions.

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75. For these points:  $Y_c = Y_a$ . The strategic Justice's utility curve over these points will perfectly track that of the attitudinal Justice.

76. For these points:  $Y_c = Y_a - C$ . The slope of the utility curve of the strategic Justice over these points equals that of the attitudinalist Justice, yet the curves are separated by a distance of  $C$  utils.

77. This assumes an even distribution of  $Z$  along the  $X$ -coordinate between the decision-points associated with  $Zmin$  and  $Zmax$ .

Figure 2

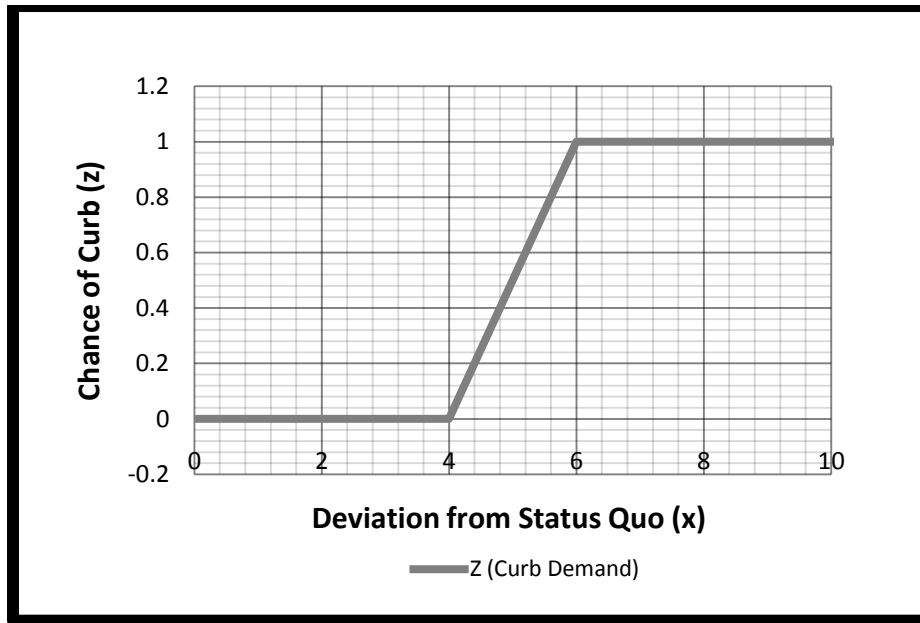


Figure 2 illustrates the  $Z$ -factor. But  $Z$ , representing the “Chance of Collateral Response” in a curb-only universe, is simply one element in the formula to determine judicial utility in a curb-only universe ( $Y_c$ ). Let us return to our earlier formula:

$$Y_c = Y_a - (C)(Z)$$

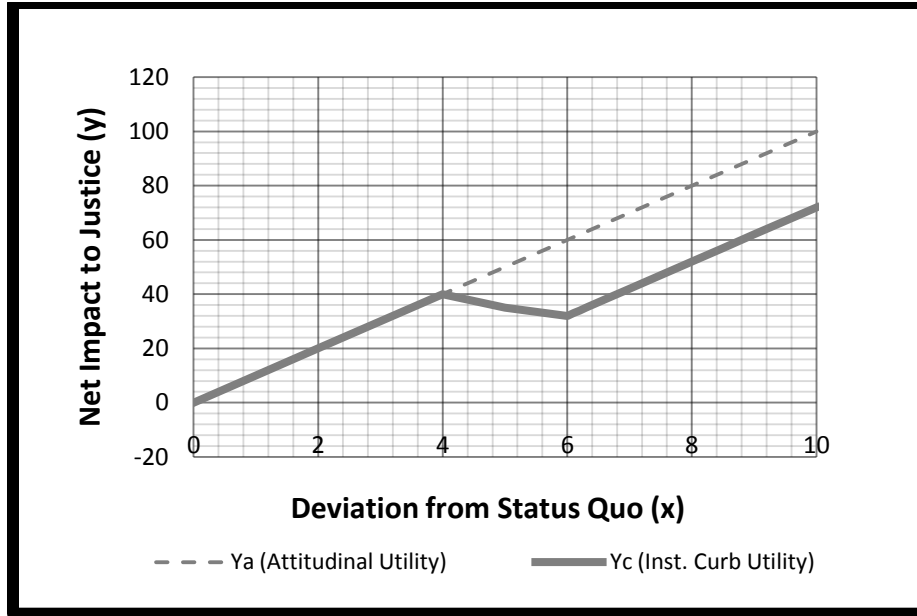
Factoring in our existing assumptions ( $Y_a = 10X$ ;  $Z_{min} = 4$ ;  $Z_{max} = 6$ ) and making the additional assumption that the policy impact of the curb is a loss of 28,<sup>78</sup> we can draw the following conclusions regarding judicial utility for a strategic Justice in a curb-only universe:

- When  $X = 2$ ; then  $Y_a = 20$ ;  $C = 28$ ;  $Z = 0$ ; so  $Y_c = 20$ .
- When  $X = 4$ ; then  $Y_a = 40$ ;  $C = 28$ ;  $Z = 0$ ; so  $Y_c = 40$ .
- When  $X = 5$ ; then  $Y_a = 50$ ;  $C = 28$ ;  $Z = .5$ ; so  $Y_c = 36$ .
- When  $X = 6$ ; then  $Y_a = 60$ ;  $C = 28$ ;  $Z = 1$ ; so  $Y_c = 42$ .
- When  $X = 10$ ; then  $Y_a = 100$ ;  $C = 28$ ;  $Z = 1$ ; so  $Y_c = 72$ .

78. This moreover assumes that  $Z$  is evenly distributed between the decision-points associated with  $Z_{min}$  and  $Z_{max}$ .

The graph below, Figure 3, contrasts the utility curve for a strategic Justice in a curb-only universe ( $Y_c$ ) with that of an attitudinal Justice ( $Y_a$ ).

Figure 3



Note that the behavior of Justices, as predicted by the attitudinal and the strategic model, are identical up to the decision-point where there is a chance that Congress might respond with a curb ( $Z_{min}$ ). While the attitudinal Justice continues to gain utils with each additional deviation from the status quo, the strategic Justice (in a curb-only universe) realizes that a vote of 4 is superior to any vote between 4 and 6.8.

## 2. Overrides

Overrides obstruct the implementation of judicial decisions, but they do not have any collateral impact on the Justice's platform of policy preferences.<sup>79</sup> To examine how overrides impact the utility

79. See *supra* notes 35–39 and accompanying text. This holds true at least in a single game environment. But the dilution of prestige that can follow an override will, in an environment of repeat games, ultimately have a negative impact on the Justice's ability to pursue preferred policies.

of strategic Justices, let us return to the general formula for “Expected Net Impact”:

$$Y = (\text{Direct Impact of } X\text{'s Implementation}) (\text{Chance of } X\text{'s Implementation}) + (\text{Impact of Collateral Response to } X) (\text{Chance of Collateral Response to } X)$$

Assuming a universe where congressional overrides are the only available constraint on judicial review, “Chance of Collateral Response” (and thus, more generally, “Expected Collateral Impact”) will be fixed at 0. Yet to measure “Expected Net Impact” of a vote, its “Expected Collateral Impact” must be aggregated with its “Expected Direct Impact.”

“Expected Direct Impact” is, of course, a product of “Direct Impact of  $X$ ’s Implementation” and “Chance of  $X$ ’s Implementation.” As discussed previously, “Direct Impact of  $X$ ’s Implementation” is signified by  $Y_a$ . The “Chance of  $X$ ’s Implementation” in an override-only universe has a direct negative relationship with the chance of an override. The likelihood of an override ( $N$ ) is a function of the Justice’s decision-point ( $X$ ). The more deviation, *ceteris paribus*, the more likely Congress will respond with an override. The following formula represents utility for a strategic Justice in an override-only universe ( $Y_o$ ):

$$Y_o = (Y_a)(1 - N)$$

Such a Justice will prefer a decision-point of  $X_1$  to  $X_2$  when:

$$(Y_{a_{x_1}})(1 - N_{x_1}) > (Y_{a_{x_2}})(1 - N_{x_2})$$

And that same Justice will prefer a decision-point of  $X_2$  to  $X_3$  when:

$$(Y_{a_{x_2}})(1 - N_{x_2}) > (Y_{a_{x_3}})(1 - N_{x_3})$$

As mentioned above, the “Chance of  $X$ ’s Implementation” in an override-only world ( $1 - N$ ) turns on congressional preferences. Such preferences can be represented along a demand curve for overrides. Where the  $X$ -coordinate represents decision-points, and the  $Y$ -coordinate represents congressional demand for an override, the override demand curve (like the curbing curve) is comprised of three sections. In any given matter of judicial review, there is one category of decision-points that constitutes a sufficiently minor deviation from the status quo such that there is no

chance of an override. For all such points  $N$  equals 0.<sup>80</sup> There is a second category of decision-points where the chance of an override is between 0 and 1. In addition, there is a third category of decision-points that constitutes such a sufficiently major deviation from the status quo that it is a certainty that Congress will override. For all such points  $N$  equals 1.

So how does a strategic Justice measure  $N$ ? He does so by estimating the largest deviation from the status quo that cannot trigger an override ( $Nmin$ ), and by estimating the smallest deviation from the status quo that will necessarily trigger an override ( $Nmax$ ).  $N$  equals 0 at all deviations less than  $Nmin$ , and  $N$  equals 1 at all deviations larger than  $Nmax$ . For any deviation between  $Nmin$  and  $Nmax$ , the  $N$ -factor is calculated by dividing the difference between the given deviation and  $Nmin$  by the difference between  $Nmax$  and  $Nmin$ .<sup>81</sup> In other words, the “Chance of Collateral Response” in a curb-only universe for a decision-point ( $X$ ) falling between  $Nmin$  and  $Nmax$  is as follows:

$$N = [(X - Nmin) / (Nmax - Nmin)]$$

Conversely, the chances of avoiding an override ( $1 - N$ ), for a decision-point ( $X$ ) falling between  $Nmin$  and  $Nmax$ , is as follows:

$$1 - [(X - Nmin) / (Nmax - Nmin)]$$

If a Justice estimates  $Nmin$  at 6 and  $Nmax$  at 8, then the  $N$  associated with a decision-point of 6.1 would equal 0.05. The following graph, Figure 4, illustrates the congressional demand for overrides based on these assumptions.

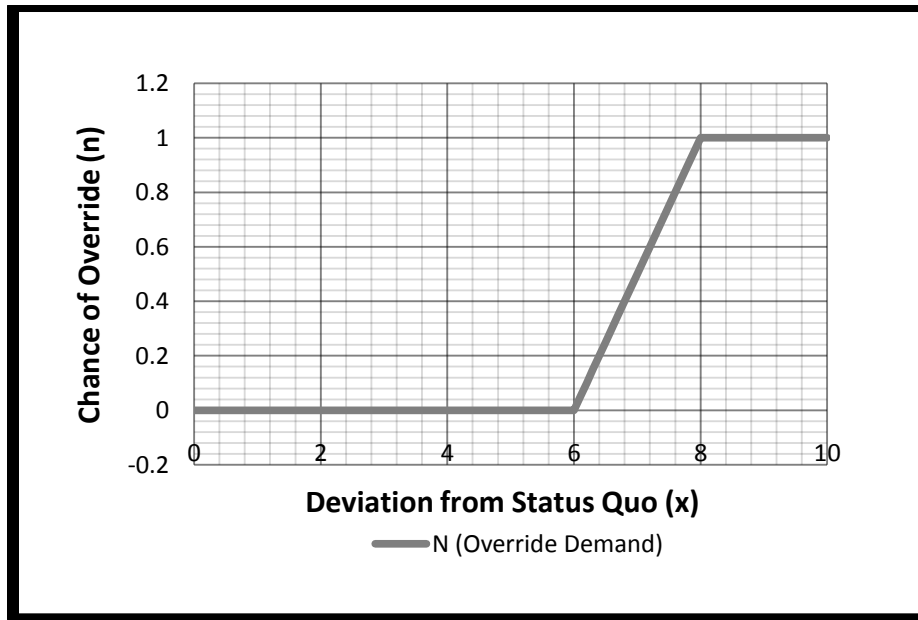
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80. For these points:  $Y_o = Y_a$ . Thus, the strategic Justice’s utility curve will, for these points, perfectly track that of the attitudinalist Justice.

81. This assumes an even distribution of  $N$  along the  $X$ -coordinate between the decision-points associated with  $Nmin$  and  $Nmax$ .



Figure 4



To determine the “Chance of  $X$ ’s Implementation” in an override-only universe, one must take a further step and evaluate the chance of *avoiding* an override ( $1 - N$ ). In our illustration, a decision-point of 6.1 results in a 0.05 chance of an override and, thus, a 0.95 “Chance of  $X$ ’s Implementation.”

Let us return to our formula for judicial utility in an override-only universe:

$$Y_o = Y_a(1 - N)$$

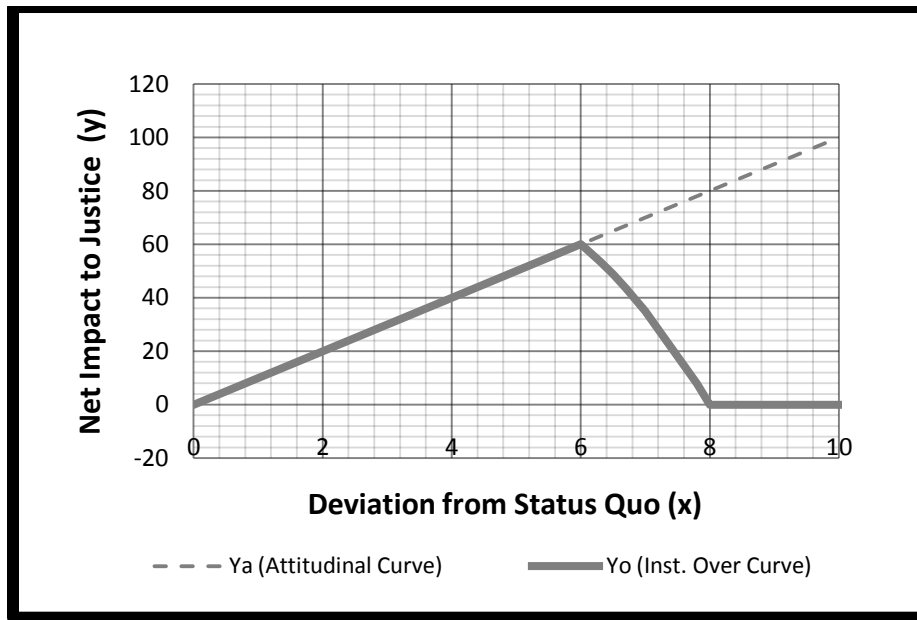
Faced with our previous assumptions ( $Y_a = 10X$ ;  $N_{min} = 6$ ;  $N_{max} = 8$ ), we can draw the following conclusions regarding judicial utility for a strategic Justice in an override-only universe:

- When  $X = 2$ ; then  $Y_a = 20$ ;  $N = 0$ ; so  $Y_o = 20$ .
- When  $X = 4$ ; then  $Y_a = 40$ ;  $N = 0$ ; so  $Y_o = 40$ .
- When  $X = 5$ ; then  $Y_a = 50$ ;  $N = 0$ ; so  $Y_o = 50$ .
- When  $X = 6$ ; then  $Y_a = 60$ ;  $N = 0$ ; so  $Y_o = 60$ .
- When  $X = 6.1$ ; then  $Y_a = 61$ ;  $N = .05$ ; so  $Y_o = 57.95$ .
- When  $X = 7$ ; then  $Y_a = 70$ ;  $N = .5$ ; so  $Y_o = 35$ .

- When  $X = 7.8$ ; then  $Y_a = 78$ ;  $N = .9$ ; so  $Y_o = 7.8$ .
- When  $X = 8$ ; then  $Y_a = 80$ ;  $N = 1$ ; so  $Y_o = 0$ .
- When  $X = 10$ ; then  $Y_a = 100$ ;  $N = 1$ ; so  $Y_o = 0$ .

The graph below, Figure 5, demonstrates how the utility curve for a strategic Justice in an override-only universe ( $Y_o$ ) deviates from the utility curve of an attitudinal Justice ( $Y_a$ ).

Figure 5



This illustrates that the optimal vote for an attitudinal Justice, based on our assumptions, is 10 (or higher), whereas the optimal vote for the strategic Justice (in an override-only universe) is 6.

### 3. The Traditional SOP Model

Of course, Justices do not operate in curb-only or override-only universes. After addressing each of the two traditional constraints in isolation, it is necessary to measure the utility for a strategic Justice in the “traditional” two-constraint paradigm (i.e., faced with the possibility of both curbs and overrides). To analyze utility in this traditional SOP model we begin, like before, with our general formula of “Expected Net Impact”:

$Y = (\text{Direct Impact of } X\text{'s Implementation}) (\text{Chance of } X\text{'s Implementation}) + (\text{Impact of Collateral Response to } X) (\text{Chance of Collateral Response to } X)$

In the traditional SOP model, the “Direct Impact of  $X$ ’s Implementation” continues to be signified as  $Ya$  (for the reasons explained in the curbing and override sections). Remember that in the curb-only universe the “Chance of  $X$ ’s Implementation” is 1, and that in the override-only universe it is  $1 - N$ . Because these factors modify the *same* element ( $Ya$ ),<sup>82</sup> the “Chance of  $X$ ’s Implementation” in a traditional SOP model is a product of the “Chances of  $X$ ’s Implementation” from the curb- and override-only universes. And so “Expected Direct Impact” in a traditional SOP model equals  $(Ya)(1)(1 - N)$ .

We now turn to examine “Expected Collateral Impact.” In the curb-only universe the “Impact of Collateral Response” is fixed at  $C$ , and in an override-only universe it is 0. In the curb-only universe “Chance of Collateral Impact” is the variable  $Z$ , and in the override-only universe it is 0. Because each of these “chance” variables modifies a *different* element (a curb and an override), the “Expected Collateral Impact” for the traditional model is equal to the aggregate of the two base products  $((C*Z) + (0*0))$  rather than the product of all the elements  $(C*0*Z*0)$ . Therefore, “Expected Collateral Impact” in a traditional SOP model equals the product of  $C$  and  $Z$ .

The utility formula for a strategic Justice in a traditional SOP model ( $Yi$ ) can be stated as:

$$Yi = Ya(1)(1 - N) + (C)(Z)$$

Taking into account that  $C$  has a negative value,<sup>83</sup> one can restate the formula as:

$$Yi = Ya(1 - N) - (C)(Z)$$

And so a Justice in a traditional SOP model will prefer a decision-point of  $X1$  to  $X2$  when:

$$[(Ya_{X1})(1 - N_{X1}) - (C*Z_{X1})] > [(Ya_{X2})(1 - N_{X2}) - (C*Z_{X2})]$$

---

82. A particular decision, for instance, will not be of *double* value to a Justice simply because it avoids *two* distinct constraints on its implementation. Moreover, the fact that the decision avoids any one constraint on its implementation does not salvage any of its value when its implementation is obstructed by a separate constraint.

83. See *supra* note 76 and accompanying text.

And that same Justice will prefer a decision-point of  $X_2$  to  $X_3$  when:

$$[(Y_{a_{x_2}})(1 - N_{x_2}) - (C * Z_{x_2})] > [(Y_{a_{x_3}})(1 - N_{x_3}) - (C * Z_{x_3})]$$

With these formulae in mind, one can begin to realize the utility curve for a strategic Justice in a traditional SOP model. Factoring in our previous assumptions ( $Y_a = 10X$ ;  $C = 28$ ;  $Z_{min} = 4$ ;  $Z_{max} = 6$ ;  $N_{min} = 6$ ;  $N_{max} = 8$ ) one can draw the following conclusions:

- When  $X = 2$ ; then  $Y_a = 20$ ;  $C = 28$ ;  $Z = 0$ ;  $N = 0$ ; so  $Y_i = 20$ .
- When  $X = 4$ ; then  $Y_a = 40$ ;  $C = 28$ ;  $Z = 0$ ;  $N = 0$ ; so  $Y_i = 40$ .
- When  $X = 5$ ; then  $Y_a = 50$ ;  $C = 28$ ;  $Z = .5$ ;  $N = 0$ ; so  $Y_i = 36$ .
- When  $X = 6$ ; then  $Y_a = 60$ ;  $C = 28$ ;  $Z = 1$ ;  $N = 0$ ; so  $Y_i = 32$ .
- When  $X = 6.1$ ; then  $Y_a = 61$ ;  $C = 28$ ;  $Z = 1$ ;  $N = .05$ ; so  $Y_i = 29.95$ .
- When  $X = 7$ ; then  $Y_a = 70$ ;  $C = 28$ ;  $Z = 1$ ;  $N = .5$ ; so  $Y_i = 7$ .
- When  $X = 7.8$ ; then  $Y_a = 78$ ;  $C = 28$ ;  $Z = 1$ ;  $N = .9$ ; so  $Y_i = -20.2$ .
- When  $X = 8$ ; then  $Y_a = 80$ ;  $C = 28$ ;  $Z = 1$ ;  $N = 1$ ; so  $Y_i = -28$ .
- When  $X = 10$ ; then  $Y_a = 100$ ;  $C = 28$ ;  $Z = 1$ ;  $N = 1$ ; so  $Y_i = -28$ .

The graph below, Figure 6, demonstrates how the utility curve for a strategic Justice in a traditional SOP model ( $Y_i$ ) deviates from the utility curves of an attitudinal Justice ( $Y_a$ ), a strategic Justice in a curb-only universe ( $Y_c$ ), and a strategic Justice in an override-only ( $Y_o$ ) universe.

Figure 6

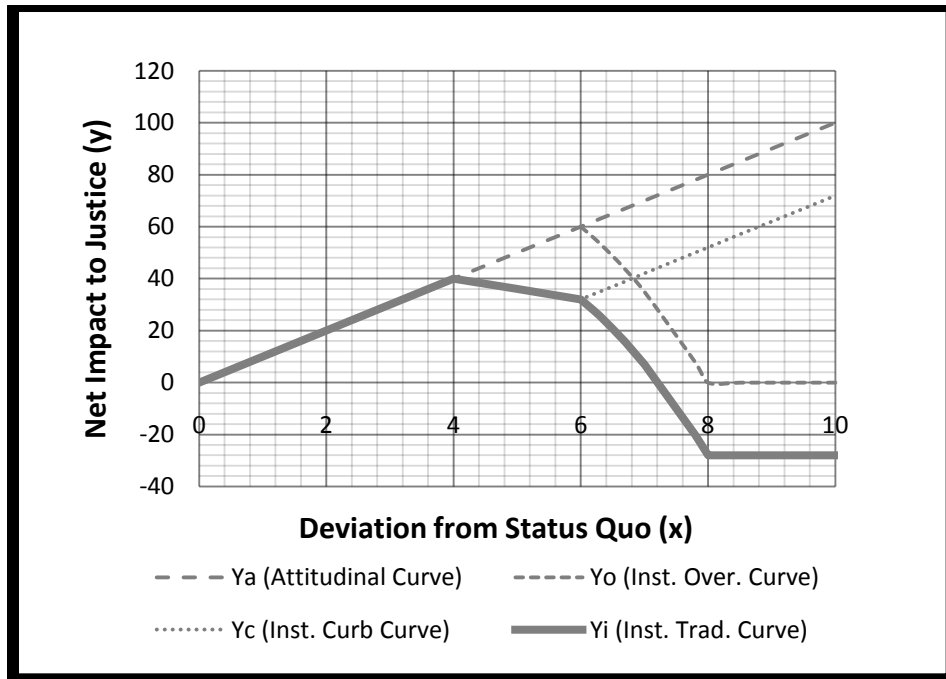


Figure 6 illustrates that, based on our given assumptions, the optimal vote for an attitudinal Justice is 10 (or higher), and the optimal vote for a Justice in a traditional SOP model is 4.

#### D. *Revising the Traditional SOP Model*

The previous subparts have illustrated how the exercise of judicial review by the Justices assumed in the judicial politics literature is constrained by congressional curbing and override measures. This article's objective, however, is to demonstrate the incompleteness of the prevailing SOP models. The following paragraphs seek to illustrate the magnitude of this oversight.

##### 1. The Funding End-Run

End-runs are congressional efforts to mitigate the costs of adverse judicial review by neither curbing nor overriding, but by a different decision that cannot be invalidated, as a practical if not legal matter, by the Court. End-runs come in various forms, in-

cluding decisions to adjust appropriations, amend contingent rules, reorient the bases for invalidated legislation in alternate constitutional clauses, or modify grants of authority to the executive branch.<sup>84</sup> To demonstrate the constraining role of the end-run, the following paragraphs hone in on the first of the identified forms of the end-run: Congress's power to adjust appropriations. To isolate the unique constraining role of this "funding" end-run, we assume a universe where the only available constraint is Congress's ability to adjust appropriations.

We begin our analysis of the funding end-run with the general formula for judicial utility:

$$Y = (\text{Direct Impact of } X\text{'s Implementation}) (\text{Chance of } X\text{'s Implementation}) + (\text{Impact of Collateral Response to } X) (\text{Chance of Collateral Response to } X)$$

As discussed in the previous subparts, "Direct Impact of  $X$ 's Implementation" is signified as  $Ya$ . The "Chance of  $X$ 's Implementation" in a strategic model with only funding end-runs has a direct negative relationship to the chance of a congressional reappropriation ( $R$ ). The  $R$ -value is variable and is a function of the Justice's decision-point ( $X$ ): The more deviation, all things being equal, the more likely Congress will repeal the level of appropriations for related programs.<sup>85</sup> So in a world where the only congressional constraint is a funding end-run, the "Expected Direct Impact" of  $X$  is the product of  $Ya$  and the chance of avoiding a reappropriation ( $1 - R$ ).<sup>86</sup>

Turning to the "Expected Collateral Impact" element, "Impact of Collateral Response" comes in the form of lost social programs favored by the Justice. This policy cost is fixed at  $L$ .<sup>87</sup> Moreover, the "Chance of Collateral Response" is a variable represented by

84. See *supra* Part II.C.

85. As an illustration, assume a Court ruling that requires notice and a hearing before the revocation of a new strain of unemployment benefits. For the Justice assumed by the judicial politics scholar, see PICKERILL, *supra* note 4, a congressional decision to defund the related program is a de facto obstruction of the implementation of the Court's decision.

86. This assumes an "all-or-nothing" approach where the program is fully utilized until the moment it is completely repealed. If  $R$  equals 0.5, this means that half of the time the program will be completely repealed and half of the time it will be let alone. Note that it does not mean that Congress will repeal half of its funding. It also assumes that the Court is focusing on only this program and not other future programs which the Justice might value differently.

87. See *supra* note 86.

$R$ .<sup>88</sup> So in a universe where the only available constraint is a funding end-run, the “Expected Collateral Impact” is simply the product of  $L$  and  $R$ .

The following formula represents the utility for a strategic Justice in a universe with only the funding form of end-run constraints ( $Yef$ ):

$$Yef = Ya(1 - R) + (L)(R)$$

Because  $L$  has a negative value for the Justice,<sup>89</sup> the formula for  $Yef$  can be restated as follows:

$$Yef = Ya(1 - R) - (L)(R)$$

A Justice in a universe with only funding end-run constraints will prefer a decision-point of  $X1$  to  $X2$  when:

$$[(Ya_{X1})(1 - R_{X1}) - (L)(R_{X1})] > [(Ya_{X2})(1 - R_{X2}) - (L)(R_{X2})]$$

That same Justice will prefer a decision-point of  $X2$  to  $X3$  when:

$$[(Ya_{X2})(1 - R_{X2}) - (L)(R_{X2})] > [(Ya_{X3})(1 - R_{X3}) - (L)(R_{X3})]$$

The basis of the formula to determine the  $R$ -value should be familiar by now. The congressional demand curve for reappropriations, like those for curbs and overrides, is comprised of three sections. For one class of decision-points (those at or below  $Rmin$ ),  $R$  will equal 0.<sup>90</sup> For another (those at or above  $Rmax$ )  $R$  will equal 1.<sup>91</sup> Yet there will be a third class of decision-points (those between  $Rmin$  and  $Rmax$ ) where the chance of reappropriation falls between 0 and 1. For decision-points in this class, the  $R$ -value can be measured by dividing the difference between  $X$  and  $Rmin$  by the difference between  $Rmax$  and  $Rmin$ :

88. Note that with a funding end-run—unlike a curb or an override—the chance of its execution ( $R$ ) affects both the “Expected Direct Impact” and “Expected Collateral Impact” of a decision-point. The funding end-run obstructs decisional implementation (i.e., the ruling is obstructed for there is no program left to be regulated) and it leads to collateral consequences coming in the form of the lost social program. The dual impact of funding end-runs differs from curbs (which operate exclusively through collateral policies) and overrides (which operate exclusively through obstructing decisional implementation).

89. The end-run’s collateral impact is subtracted when such impact is negative. If the end-run were expected to cause a collateral gain (a rare circumstance) then one would, of course, add the impact to the base formula. See generally *supra* note 76 and accompanying text.

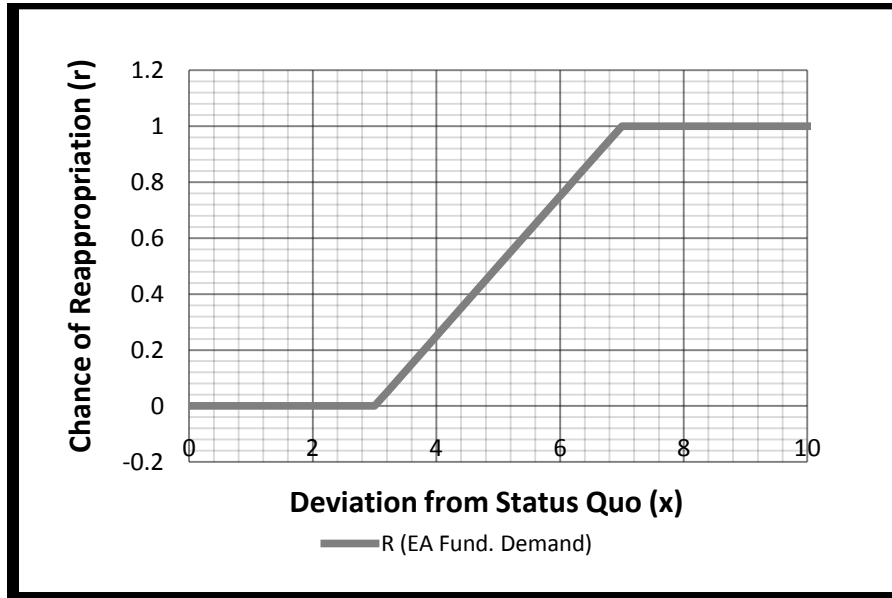
90. For these points:  $Yfe = Ya$ . The utility curve of the strategic Justice will, over these points, perfectly track that of the attitudinal Justice.

91. For these points:  $Yfe = -L$ .

$$R = [(X1 - X_{RMIN}) / (X_{RMAX} - X_{RMIN})]$$

If one assumes that a Justice estimates *Rmin* at 3 and *Rmax* at 7, then the *R*-value of a decision-point of 3.5 equals 0.125. The following graph, Figure 7, illustrates the congressional demand for reappropriation.

Figure 7



To determine the “Chance of *X*’s Implementation” in a universe with only funding end-run constraints, one must take the further step to evaluate the chance of *avoiding* such an end-run ( $1 - R$ ). In our illustration, a decision-point of 6.1 leads to a 0.125 chance of appropriation and, thus, a 0.875 “Chance of *X*’s Implementation.”

To illustrate the utility of a strategic Justice in a universe with only funding end-runs (*Yef*), we should return to our formula for *Yef*:

$$Yef = Ya(1 - R) - (L)(R)$$

Taking our previous assumptions ( $Ya = 10X$ ;  $Rmin = 3$ ;  $Rmax = 7$ ), and adding the assumption that  $L = 12$ , we can draw the following conclusions regarding judicial utility:



- When  $X = 2$ ; then  $Ya = 20$ ;  $L = 12$ ;  $R = 0$ ; so  $Yef = 20$ .
- When  $X = 3$ ; then  $Ya = 30$ ;  $L = 12$ ;  $R = 0$ ; so  $Yef = 30$ .
- When  $X = 3.5$ ; then  $Ya = 35$ ;  $L = 12$ ;  $R = .125$ ; so  $Yef = 29.125$ .
- When  $X = 6$ ; then  $Ya = 70$ ;  $L = 12$ ;  $R = .75$ ; so  $Yef = 6$ .
- When  $X = 7$ ; then  $Ya = 70$ ;  $L = 12$ ;  $R = 1$ ; so  $Yef = -12$ .
- When  $X = 10$ ; then  $Ya = 100$ ;  $L = 12$ ;  $R = 0$ ; so  $Yef = -12$ .

The graph below, Figure 8, demonstrates how the utility curve for a strategic Justice in a universe with only funding end-run constraints ( $Yef$ ) deviates from the utility curve of an attitudinal Justice ( $Ya$ ).

Figure 8

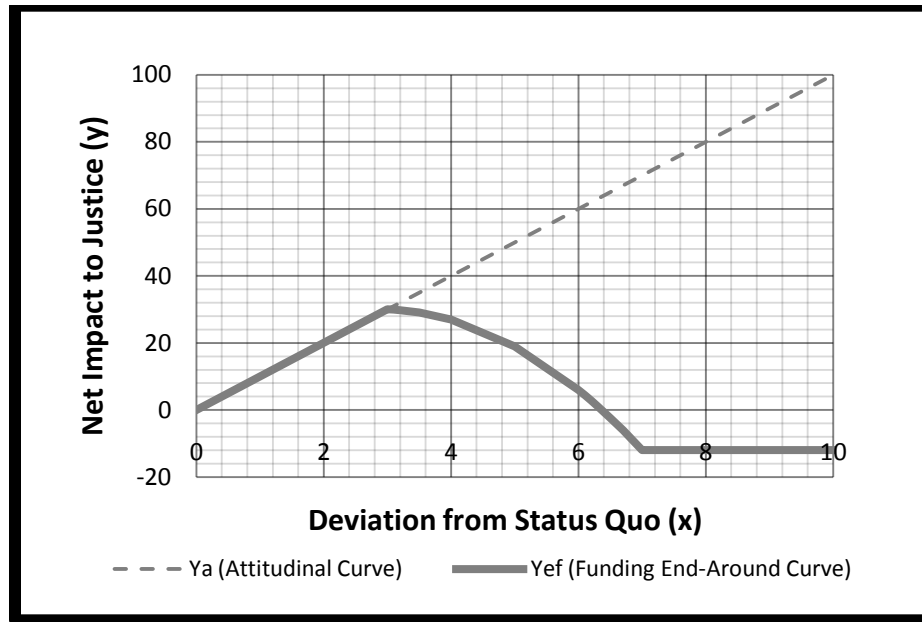


Figure 8 illustrates that the optimal vote is 10 (or higher) for an attitudinal Justice, but only 3 for a strategic Justice in a universe with only funding end-runs.

Upon analyzing the funding form of the end-run in isolation, we now turn to incorporate it into the traditional SOP model set forth in the previous subpart. To do so, we begin by returning to the utility formula for Justices in the traditional SOP model ( $Yi$ ):

$$Y_i = (Y_a)(1 - N) - (C)(Z)$$

To integrate the formula for the traditional SOP model ( $Y_i$ ) with that for the end-run ( $Y_{ef}$ ), one must multiply the “Expected Direct Impact” component of the traditional SOP formula ( $(Y_a)(1 - N)$ ) by the chance of avoiding an end-run ( $1 - R$ ).<sup>92</sup> One then subtracts from the entire equation the product of the end-run’s “Policy Impact of Collateral Response” and “Chance of Collateral Response” ( $(L)(R)$ ). The formula for judicial utility in this revised SOP model ( $Y_r$ ) can be stated as follows:

$$Y_r = (Y_a)(1 - N)(1 - R) - (C)(Z) - (L)(R)$$

Factoring in our previous assumptions that  $Y_a = 10X$ ;  $N_{min} = 6$ ;  $N_{max} = 8$ ;  $Z_{min} = 4$ ;  $Z_{max} = 6$ ;  $R_{min} = 3$ ;  $R_{max} = 7$ ;  $C = 28$ ; and  $L = 12$ , we can draw the following conclusions about judicial utility:

- When  $X = 4$ ,  $Y_a = 40$ ;  $N = 0$ ;  $R = .25$ ;  $C = 28$ ;  $Z = 0$ ;  $L = 12$ ; so  $Y_r = 27$ .

- When  $X = 5$ ,  $Y_a = 50$ ;  $N = 0$ ;  $R = .5$ ;  $C = 28$ ;  $Z = .5$ ;  $L = 12$ ; so  $Y_r = 5$ .

- When  $X = 6$ ,  $Y_a = 60$ ;  $N = 0$ ;  $R = .75$ ;  $C = 28$ ;  $Z = 1$ ;  $L = 12$ ; so  $Y_r = -22$ .

- When  $X = 7$ ,  $Y_a = 70$ ;  $N = .5$ ;  $R = 1$ ;  $C = 28$ ;  $Z = 1$ ;  $L = 12$ ; so  $Y_r = -40$ .

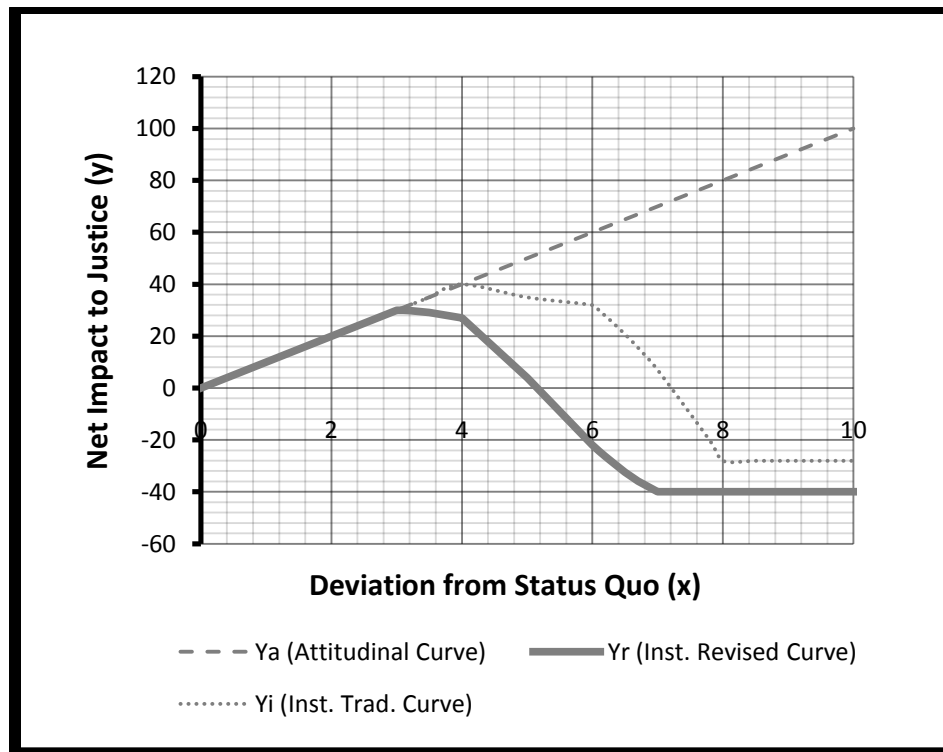
- When  $X = 10$ ,  $Y_a = 100$ ;  $N = 1$ ;  $R = 1$ ;  $C = 28$ ;  $Z = 1$ ;  $L = 12$ ; so  $Y_r = -40$ .

The graph below, Figure 9, demonstrates how judicial behavior for a strategic Justice deviates when congressional end-runs are contemplated.  $Y_i$  represents the utility curve for a Justice in a traditional SOP model (that ignores end-runs), whereas  $Y_r$  represents the utility curve for a Justice in a “revised” SOP model that contemplates the possibility of end-runs.

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92. For a discussion of why the integration process requires “multiplication” to figure the “Expected Direct Impact” and “subtraction” for “Expected Collateral Impact,” see *supra* text accompanying notes 84–85.

Figure 9



This figure shows that, based on the above assumptions, the optimal vote is 10 (or higher) for the attitudinal Justice, 4 for the strategic Justice in a traditional SOP model, and 3 for a Justice in the revised SOP model. Importantly, this demonstrates how the end-run constraint shifts the utility curve of the Justices assumed in the judicial politics literature.

## 2. Incorporating Additional Forms of End-Runs

The previous discussion analyzed the impact of only one type of end-run (the adjustment of appropriations). There are, of course, additional forms of the end-run. And each form, as it turns out, can be easily incorporated into our revised SOP model.

To reconsider the unique constraining effect of a particular form of the end-run constraint on judicial utility, one should

make two amendments to any base SOP formula for judicial utility.<sup>93</sup> First, one should multiply the “Expected Direct Impact” element of the base formula by the chance that the decision-point will avoid triggering the new form of end-run (which is, in turn, a function of Congress’s demand for that end-run).<sup>94</sup> Second, one should subtract from the entire base formula the product of the collateral policy lost by the implemented end-run and the chance of the end-run’s implementation.<sup>95</sup>

For example, we can analyze the unique constraining role of the congressional end-run of “amending a contingent rule” in relation to the revised SOP model set forth in the previous subsection ( $Yr$ ). Assume that this “contingent rule” form of end-run has a collateral cost of  $J$  and a chance of  $W$ . Amending the base formula of  $Yr$ , we see that a strategic Justice in a universe where this new “contingent” end-run is also available ( $Yr^*$ ) can be stated as follows:

$$Yr^* = (Ya)(1 - N)(1 - R)(1 - W) - (C)(Z) - (L)(R) - (J)(W)$$

As a further example, consider the end-run coming in the form of “reorienting the constitutional bases of invalidated legislation in an alternate constitutional clause.” Assume that this form of end-run has a collateral impact of 0 and a chance of  $P$ .<sup>96</sup> The utility of a strategic Justice in a universe with all three types of end-runs ( $Yr^{**}$ ) can be expressed as follows:

$$Yr^{**} = (Ya)(1 - N)(1 - R)(1 - W)(1 - P) - (C^*Z) - (L^*R) - (J^*W) - (P^*0)$$

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93. By “base” I mean the formula for the model encompassing the constraints against which you seek to evaluate the constraining role of the end-run. Note that with most (but not all) forms of end-runs, the chance of its execution affects both the “Expected Direct Impact” and “Expected Collateral Impact” of a decision-point. Most forms have the possibility to obstruct decisional implementation and create collateral consequences. *See supra* note 88.

94. *See supra* note 91 on why it is proper to calculate the product of (rather than the difference between) the base formula and the chance that the end-run will not disrupt decisional implementation.

95. *See generally supra* note 92.

96. One can assume expected collateral costs of 0 with this form of end-run because Congress will, in response, do no more than seek to simply resurrect its lost policy. If there were a risk that Congress would, in response, seek to advance a more robust form of the policy offensive to the voting Justice, then expected collateral costs would, of course, exist. Collateral costs seem unlikely for, were Congress interested in a more robust form of policy offensive to the Justice, it would have advanced such a policy in its *initial* legislative effort.

Factoring in our previous assumptions ( $Y_a = 10X$ ;  $N_{min} = 6$ ;  $N_{max} = 8$ ;  $Z_{min} = 4$ ;  $Z_{max} = 6$ ;  $R_{min} = 3$ ;  $R_{max} = 7$ ;  $C = 28$ ;  $L = 12$ ), and adding further assumptions ( $W_{min} = 2$ ;  $W_{max} = 9$ ;  $P_{min} = 7$ ;  $P_{max} = 8$ ;  $J = 4$ ), one draws the following conclusions regarding judicial utility:

- When  $X = 4$ ,  $Y_a = 40$ ;  $N = 0$ ;  $R = .25$ ;  $W = .29$ ;  $P = 0$ ;  $C = 28$ ;  $Z = 0$ ;  $L = 12$ ;  $J = 4$ ; so  $Yr^{**} = 17.29$ .

- When  $X = 5$ ,  $Y_a = 50$ ;  $N = 0$ ;  $R = .5$ ;  $W = .43$ ;  $P = 0$ ;  $C = 28$ ;  $Z = .5$ ;  $L = 12$ ;  $J = 4$ ; so  $Yr^{**} = -7.42$ .

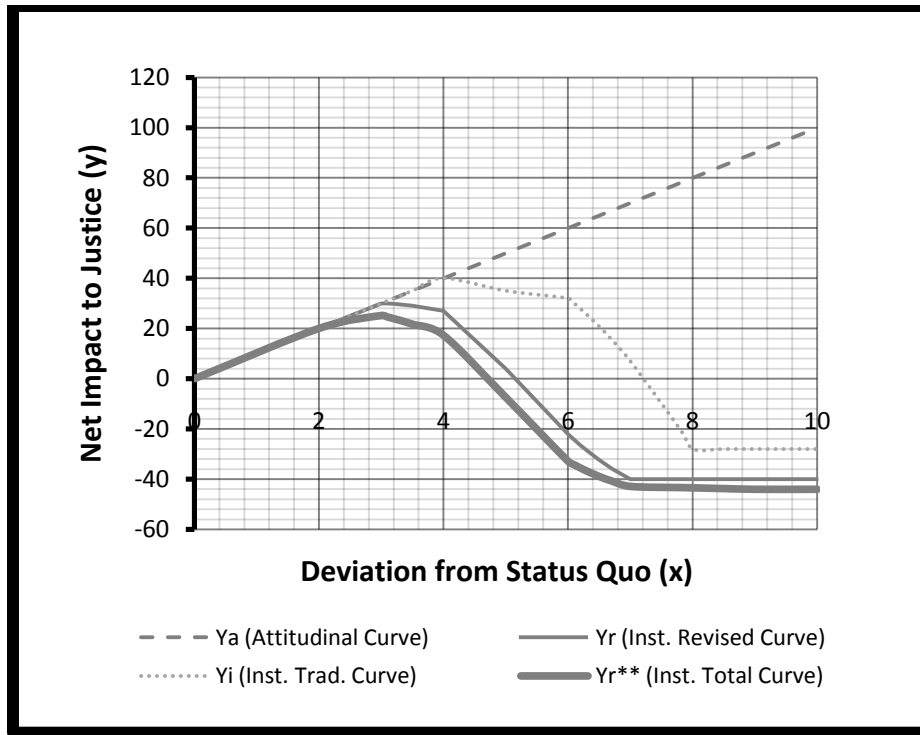
- When  $X = 6$ ,  $Y_a = 60$ ;  $N = 0$ ;  $R = .75$ ;  $W = .57$ ;  $P = 0$ ;  $C = 28$ ;  $Z = 1$ ;  $L = 12$ ;  $J = 4$ ; so  $Yr^{**} = -32.86$ .

- When  $X = 7$ ,  $Y_a = 70$ ;  $N = .5$ ;  $R = 1$ ;  $W = .71$ ;  $P = 0$ ;  $C = 28$ ;  $Z = 1$ ;  $L = 12$ ;  $J = 4$ ; so  $Yr^{**} = -42.86$ .

- When  $X = 10$ ,  $Y_a = 100$ ;  $N = 1$ ;  $R = 1$ ;  $W = 1$ ;  $P = 1$ ;  $C = 28$ ;  $Z = 1$ ;  $L = 12$ ;  $J = 4$ ; so  $Yr^{**} = -44$ .

The graph below, Figure 10, demonstrates how the utility curve for a strategic Justice in an SOP model with multiple end-runs ( $Yr^{**}$ ) deviates from the utility curve of a Justice in a traditional SOP model ( $Y_i$ ), and the utility curve of a Justice in a traditional SOP model that includes only the funding end-run ( $Y_r$ ).

Figure 10



This demonstrates how a Justice's contemplation of each new end-run presents the possibility of a unique shift in the strategic Justice's utility curve.

#### IV. CONCLUSION

The judicial politics literature on the role of Congress in judicial review remains inconclusive. This protracted state of uncertainty might ultimately be explained by the literature's undue dependence on a two-constraint paradigm. For five decades judicial politics scholars have confined their analyses to two types of congressional constraints on judicial review. But by examining recent developments in constitutional theory, one can infer a new, heretofore ignored constraint on judicial review. This constraint is the congressional end-run.

End-runs occur where Congress seeks to mitigate the policy implications of adverse judicial review by neither formally limiting the Court's authority nor by substituting its preferred inter-

pretation for that of the Court, but through a different decision which cannot, as a practical if not legal matter, be invalidated by the Court. Examples of the congressional end-run include decisions to modify grants of authority to the executive branch, adjust appropriations, amend contingent rules, or reorient the bases for legislation in an alternate constitutional clause. The strategic Justices assumed by judicial politics scholars will at some points compromise their exercise of judicial review to avoid triggering end-runs damaging to their overall policy agenda.

This article puts forth a formal theoretical model of the end-run. This model reveals that the traditional SOP models (which have worked within the two-constraint paradigm) have systematically underestimated the degree to which their assumed Justices are constrained by Congress. Judicial politics scholars should amend their formal models and redesign their empirical studies to account for the constraining effect of the congressional end-run. This reorientation will likely give political scientists a fuller understanding of the interactions between Congress and the Supreme Court.