# CONGRESSIONAL SILENCE AND THE STATUTORY INTERPRETATION GAME

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ABSTRACT

*This Article explores the circumstances under which the federal legislative apparatus may be unable to respond to a politically objectionable statutory interpretation from the Supreme Court. The Article builds upon existing economic models of statutory interpretation, incorporating transaction costs into the analysis for the first time. The Article concludes by identifying recent real-world disputes in which transaction costs likely constrained Congress and the President from overriding the Court.*

* Associate Professor of Law, University of Illinois College of Law. This Article is dedicated to the memory of Larry Ribstein, whose tireless efforts made both this Article and its author better. Special thanks to Janet Alexander, Richard Epstein, Larry Solum, Jud Mathews, and Jonathan Woon for their comments on earlier versions of the Article. Comments from the law faculties of Washington University in St. Louis and Notre Dame University also improved the Article substantially, as did comments from participants at the Junior Faculty Federal Courts Workshop, the Washington University Junior Faculty Regional Workshop, and the Midwest Political Science Association Annual Conference. Thanks also to Kimberly Watson for her able research assistance and to my fantastic colleagues at the University of Illinois for many fruitful and helpful discussions.

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> "Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct."[1]

> "[Transactions] are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost."[2]

## INTRODUCTION

In January 2009, the Democratic Party controlled both chambers of Congress decisively; it also held the White House.[3] And at least twice during that two-year period, a conservative Supreme Court issued statutory interpretation opinions deeply unpopular with rank-and-file congressional Democrats and the President. In *Northwest Austin Municipal Utility District Number One v. Holder (NAMUDNO)*, the Court ruled that a Texas municipal utility district could "bail out" of the preclearance requirements of the Voting Rights Act despite the state's history of discrimination against minority voters.[4] In *Ashcroft v. Iqbal*, the Court expanded and cemented the holding of a revolutionary 2007 case,[5] finding that the "short and plain statement" pleading standard of Rule 8(a)(2) of the Federal Rules of Civil Procedure requires all civil plaintiffs to demonstrate that their factual contentions are "plausible" in order to survive a motion to dismiss.[6]

Both *NAMUDNO* and *Iqbal* represent conservative interpretations very likely at odds with the preferences of the 111th Congress;

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1. Johnson v. Transp. Agency, 480 U.S. 616, 629 (1987).

2. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

3. Charlie Savage, *Democrats Look for Ways to Undo Late Bush Administration Rules*, N.Y. TIMES, Jan. 12, 2009, at A10.

4. 557 U.S. 193, 211 (2009).

5. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007) (holding that, in order to state a claim under the Sherman Antitrust Act, a plaintiff must plead enough facts to demonstrate that an agreement was made).

6. 566 U.S. 662, 677-78, 684 (2009). The *Iqbal* opinion interpreted Rule 8 of the Federal Rules of Civil Procedure. *See id.* However, the Rule has statutory force and can be revised or overridden by Congress. *See* Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69, 78-79 (2010). In fact, Congress did just that with the entirety of the proposed Federal Rules of Evidence in 1973. *See* Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 125-27 (1973). *Iqbal* is thus functionally a statutory interpretation opinion.

both opinions are also arguably deeply inconsistent with congressional preferences at the times the relevant statutory provisions were enacted or reauthorized.[7] Moreover, *NAMUDNO* and *Iqbal* were both publicly salient cases; the *New York Times* published editorials on both decisions, and members of Congress were obviously aware of the opinions.[8] But by the time the Democrat-dominated 111th Congress gave way to the politically divided 112th Congress in January 2011, the only political response to these decisions was silence.

This silence raises a larger question: when the Supreme Court interprets a statute, to what extent does subsequent congressional inaction really represent political agreement with, or acquiescence to, that interpretation? This is a difficult question to answer conclusively. The complex internal, intertemporal, and interdependent dynamics of our political process are such that it is remarkably hard to pin down "congressional intent" at the time a statute was passed, at the time the Court issued its initial interpretation, or at any point in the future.[9]

In this Article, I approach the old puzzle of congressional silence in a new way. In particular, I explore the economics of congressional overrides in a spatial model that sheds more and better light on the conditions under which the political branches may not be *able* to respond to an undesirable judicial interpretation. My approach is

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7. *See* Luis Fuentes-Rohwer, *Judicial Activism and the Interpretation of the Voting Rights Act*, 32 CARDOZO L. REV. 857, 878 (2011); Editorial, *Restoring Access to the Courts*, N.Y. TIMES, Dec. 22, 2009, at A40.

8. Editorial, *The Voting Rights Act Survives*, N.Y. TIMES, June 23, 2009, at A24; Editorial, *Throwing Out Mr. Iqbal's Case*, N.Y. TIMES, May 20, 2009, at A28; *see also Access to Justice Denied:* Ashcroft v. Iqbal*: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 1 (2009) (statement of Hon. Jerrold Nadler, Chairman, Subcomm. on the Constitution, Civil Rights & Civil Liberties); Brief of Rep. John Conyers, Jr., et al. as Amici Curiae in Support of Appellees at 10-13, *NAMUDNO*, 557 U.S. 193 (No. 08-322), 2009 WL 815238 at *10-14.

9. Commentators are divided on this issue. Textualists typically reject any claim that congressional silence has meaning, whereas purposivists tend to find at least some signal in long-standing congressional silence. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting) (providing the textualist view); LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 44-47, 49-51 (2d ed. 2009) (explaining the purposivism and textualism theories); Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 8-13 (1988) (discussing various interpretations of the meaning of congressional silence).

grounded in public choice and positive political theory, but this Article represents a significant extension of my earlier work,[10] incorporating transaction cost economics concepts to further refine our understanding of the relationship between the political branches and the judiciary.

Other scholars have used the insights of public choice theory[11] to generate a variety of *normative* approaches to the problems of statutory interpretation and judicial review more generally.[12] For the most part, this work assumes that self-interest ends at the foot of the judge's bench; these authors are primarily concerned with telling judges how they should interpret statutes in light of the interest group dynamics that public choice theory sees as defining the content of enacted legislation.[13] They therefore tend to take judicial fidelity to some form of legislative intent as a given. Nonetheless, telling judges how they *should* act does not say all that much about how they *will* act, and we cannot assume that judges will always interpret statutes consistently with either original legislative intent or the current political climate.

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10. Stancil, *supra* note 6 (exploring the committee rule-making process and the potential for transaction-cost arbitrage).

11. For an excellent introduction to public choice theory, see MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009).

12. *See* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986). In fairness, Professor Elhauge does not really offer a normative approach to judicial review; rather, he argues persuasively, if somewhat nihilistically, that any normative approach to judicial review premised on interest group theory contains a submerged and highly contestable normative baseline of its own. ELHAUGE, *supra*, at 2, 263-72.

13. *Compare*, *e.g.*, Macey, *supra* note 12, at 226-27 (encouraging courts to construe statutes in ways that further public interest objects while limiting interest group payoffs), *with* Eskridge, *supra* note 12, at 323-24 (encouraging courts to "update" statutes by reference to the broad or narrow distribution of costs and benefits associated with the statute). The fact that these authors focus on telling judges what to do does not mean that they are insensitive to the issue of judicial preferences; rather, they simply use interest group theory as a framework for evaluating the proper normative approach of a hypothetically disinterested judge.

A second, somewhat less-developed vein of scholarship does attempt to account for potential divergence between judicial and political policy preferences, incorporating those differences into preliminary positive models of judicial behavior. Pablo Spiller and his coauthors offer the purest examples of the genre, though their work both builds upon and complements work by numerous others, all of whom employ positive political theory/pivotal politics models[14] to analyze interactions between the executive, legislatures, courts, and administrative agencies.[15] Spiller in particular takes an important first step in explaining judicial discretion in economic terms, describing various features of the relationship between courts, legislatures, and the executive in game theoretical terms that expressly account for diverging policy preferences among the President, House, Senate, and Supreme Court.[16]

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14. The two labels are effectively synonyms; both refer to the study of political outcomes using formal methods, such as social choice theory, game theory, and statistical analysis. *See, e.g.*, KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 20-48 (1998); Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 462 (1992) (explaining that positive political theory "consists of non-normative, rational-choice theories of political institutions").

15. *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263 (1990); Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499 (1989); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671 (1992); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS., Winter 1994, at 3 [hereinafter McNollgast, *Legislative Intent*] (McNollgast is an amalgam of Matthew McCubbins, Roger Noll, and Barry Weingast, who together have written a series of deeply influential positive political theory articles); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992) [hereinafter McNollgast, *Positive Canons*]; Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as an Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

16. For ease of reference, I use the term "Spiller" generically to refer to this body of work; references to specific articles will contain the names of all relevant authors. *See, e.g.*, Mario Bergara, Barak Richmond & Pablo T. Spiller, *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247 (2003); Gely & Spiller, *supra* note 15; Pablo T. Spiller, *Agency Discretion Under Judicial Review*, 16 MATHEMATICAL & COMPUTER MODELING 185 (1992); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-88*, 23 RAND J. ECON. 463 (1992); Pablo T. Spiller & Emerson H. Tiller, *Invitations to*

This earlier work is deliberately preliminary in one critical way: none of the preexisting models incorporate the transaction costs associated with political responses to judicial missteps. This omission, although understandable and intentional, is nonetheless significant.

As commentators dating back to Hart and Sacks have recognized, it is costly to draft and pass legislation overriding an undesirable judicial interpretation.[17] Moreover, it is particularly difficult for the political branches to control the courts by other means. They cannot effectively fire, suspend, or chastise Article III judges for failing to effectuate congressional desires.[18] Sitting at the apex of a coequal branch of government, Justices of the Supreme Court are even less subject to effective direct control than Article III judges generally.[19] The costs associated with an affirmative *legislative* response to mistaken statutory interpretation thus take on outsized importance because alternative mechanisms of control are functionally unavailable.[20]

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*Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996).

17. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 164-65 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) (discussing the various functions of the legislature and the inherent time and cost requirements).

18. *See* U.S. CONST. art. III, § 1; *How the Federal Courts Are Organized: Federal Judges and How They Get Appointed*, FED. JUD. CENTER, http://1.usa.gov/yS2Cwc (last visited Feb. 14, 2013). The nonoverride options available to political players dissatisfied with judicial action are not merely limited. Rather, they are typically the regulatory equivalent of nuclear weapons, useful primarily for their deterrent effect in preventing interbranch "total war." *See infra* Part I.B.1.c. Impeachment, funding restrictions, and even jurisdiction stripping are dramatic and independently costly responses; they will likely be viewed as disproportionate to the offense in the typical statutory interpretation dispute. Other mechanisms for controlling the courts—such as refusing to confirm appointments and manipulating the vacancy rate, for example—although less radical, are also less likely to hit their intended target without substantial, unintended collateral damage.

19. The same odd dynamic exists at some level for non-Article III judges as well. It is also present, if perhaps to a slightly lesser extent, in the context of many regulatory relationships. Compared to a business executive hired to manage a private corporation, for example, an executive branch agency administrator is quite insulated from direct control, as is even an elected state court judge.

20. As I discuss below, control costs are relevant insofar as they form the backdrop for the discretion-eliminating statutory specificity upon which the analysis depends. The more deterministic a statutory command, the lower the costs of disciplining the Court for misinterpretation. This is true even when the current Congress disagrees with the deterministic statute in question on policy grounds, because the broader costs to Congress

In this Article, I elaborate a more robust economic model of legislation and statutory interpretation in which Justices interact with the Executive and the Legislature to shape public policy. More formally, I incorporate regulatory transaction costs into a model[21] that predicts specific statutory interpretation policy outcomes in the context of a single interaction between the Court and the political branches. The result depends upon *both* the parties' ex ante preferences *and* the transaction costs those parties face when responding to a judicial interpretation inconsistent with those preferences.[22]

I do not purport to explain judicial behavior completely, of course. Despite the constant drumbeat of popular criticism, many judges—even Supreme Court Justices—often do their best to interpret statutes in good faith, regardless of their abstract policy preferences on the issue under consideration.[23] Moreover, the repeat player

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of allowing the Court to reject deterministic commands more generally are so extraordinarily high.

21. In even more formal terms, I present a single-iteration spatial model. This simply means that the model focuses on a single interaction between the Court and the political branches without regard to future consequences, and that I use one- and two-dimensional diagrams to develop and explain the model. The single-iteration limitation is significant; though I discuss repeat player concerns briefly in various places, I will take them up more thoroughly in subsequent work. My spatial modeling technique represents a logical extension of a well-accepted methodology in the public choice and political science literatures. Though I do not present a formal model with equations, "model" is nonetheless the appropriate label.

22. This Article is the foundation of a series of articles in which I will comprehensively explore the transaction cost economics of regulation. The insights of this foundational piece apply with equal force and little alteration in effectively every regulatory context involving one or more veto players and agents with interpretive authority. Like Spiller, I retain several traditional assumptions in order to better illustrate the effects that transaction costs have upon political outcomes. *See, e.g.*, Gely & Spiller, *supra* note 15, at 267-68. Specifically, I retain the assumption that each policy interaction between the Court, legislature, and the executive is a single-iteration game; this in turn eliminates the complication of expressing transaction costs in net present value terms. I also bracket the problem of intermediate signaling strategies. I will take on these issues in subsequent work. While I acknowledge that a spatial model of the sort I present cannot capture all of the richness and complexity of real-world interactions between and among the executive, legislators, and judges, my two-dimensional model that incorporates transaction costs comes close enough to provide significant insight and, as important, testable hypotheses.

23. *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 885-87 (1975) (articulating a theory of judicial interpretation in which judges' incentives lie with enforcing the terms of the original statutory deal); *see also* MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE, at xi (2011) (explaining that Supreme Court Justices are constrained in their decisions by external forces). I leave aside questions regarding the backdrop against which good faith is to be evaluated.

nature of the relationships between Congress, the President, the Court, and various interest groups is likely to exercise some mitigating influence upon judicial behavior, as will courts' independent incentives to enforce original statutory bargains.[24] Even assuming that the various players[25] do act to maximize the realization of their own preferences in any given interaction, a simplified, stylized model of the sort I present cannot hope to capture every nuance of the complicated regulatory dance. In particular, the introduction of uncertainty would likely affect outcomes dramatically, relative to a model assuming perfect and complete knowledge of each player's preferences.[26] At the same time, however, a single-iteration model assuming that judges are motivated by base self-interest helps identify the specific contexts in which courts have space to move policy away from the nominal political consensus without the threat of legislative override.[27]

This Article has three parts. In Part I, I present a unidimensional version of the model, exploring the issue in the context of a hypothetical debate over federal policy regarding the appropriate number of charter schools. Specifically, a hypothetically self-interested Supreme Court has granted certiorari on a case requiring it to interpret a preexisting charter schools statute; its interpretation will fix policy somewhere along a continuum from fewer to more schools, subject to the threat of override by the political

24. *See, e.g.*, Landes & Posner, *supra* note 23, at 885-86; McNollgast, *Positive Canons, supra* note 15, at 706.

25. Throughout the Article, I refer to the House, Senate, President, and Supreme Court as "players"; although one can easily conceptualize my analysis in game theoretical terms, I deliberately avoid a formal game theoretical analysis because the baggage associated with such an analysis tends to obscure the point. My model demonstrates the incentives facing various regulatory actors by virtue of the costs associated with political action. To the extent its assumptions mirror reality, it thus helps us to define the zones within which the Supreme Court can stray from political preferences without correction, without regard for whether such deviations are intentional or accidental.

26. As discussed in Part III below, the model can be expanded to include uncertainty with some additional effort; I will take up this project in subsequent work.

27. In later work, I will also take up repeat player issues, including an analysis of the *judicial* costs associated with deviation from political preferences. For now, however, I am interested in a hypothetical Court that is motivated solely by a desire to see the best possible result, from its perspective, in connection with the policies implicated by a single statute up for review on a writ of certiorari. My analysis thus helps establish a baseline for the amount of discretion available to the Court in the context of a single case.

branches. In this hypothetical, the Court's preferences lie well to the right of the preferences of all three political players.[28]

I first present a traditional, transaction-cost-free analysis. In a world without response costs, the Court will be unable to establish any interpretation outside the ideal point of the political player whose preferences are closest to the Court's.[29] If the status quo ante lies anywhere to the left of the rightmost political player's ideal point, the Court can still move policy permanently in its preferred direction by selecting the interpretation consistent with that closest political player's ideal preferences.[30] But it can go no further.

Once we introduce player-specific response costs, the calculus changes. Under certain cost conditions, the Court will have limited or no ability to step outside the nearest player's ideal point. Under other cost conditions, the political players' response costs may provide the Court with an interpretive safe haven well outside of the closest political player's ideal point. Under still others, the extent of the Court's ability to step outside is indeterminate, and will depend upon the political players' own internal bargaining power dynamics.

The players' net cost-benefit calculations drive the analysis. In general terms, the Court's discretion to deviate is limited by the response costs of the lowest-cost political player. Given the nature of the legislative enterprise, it will often be the case that a single low-response-cost political player can limit judicial discretion without significant assistance from its other political counterparts.

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28. This is not necessary to the model in any way, but it does simplify the presentation somewhat. *See infra* Part I.

29. Without incorporating transaction costs, the analysis is quite similar to that of Eskridge and Ferejohn, whose work offered the inspiration for an expanded analysis incorporating transaction costs. *See* Eskridge & Ferejohn, *supra* note 15. As with any multimember body, the Supreme Court as a whole does not technically have a preference of its own; rather, in the unidimensional context, we identify "its" ideal point by identifying the preference of the Court's median member. Because the median member's vote provides a coalition with the minimum five votes necessary for a majority, her preference is dispositive. The same is true for the chambers of Congress. In two or more dimensions, formal median-member modeling is no longer valid, but we can estimate player ideal points in a similar way. *See, e.g.*, Gely & Spiller, *supra* note 15, at 270-98 (providing models estimating the various players' ideal points); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 436-39 (1989) (same). *But see* Shepsle, *supra* note 15, at 254 (noting that the mechanics of actual legislative give-and-take make reliance on such models questionable).

30. *See, e.g.*, Gely & Spiller, *supra* note 15, at 264, 276.

If the internal dynamics of the House of Representatives make it a particularly low-cost responder, for example,[31] its ability to pull the laboring oar for the Senate and President may leave the Court with relatively little space in which to interpret outside of the political consensus. This may be the case even if the Senate and President face relatively high response costs of their own, because the Senate and President can free ride on the House's efforts to craft a legislative response. By contrast, when response costs are high for all players, the Court may possess substantial, additional interpretive discretion.

To determine whether a particular interpretation is viable—that is, safe from congressional override—we look to each player's response costs and the associated benefits. If the politically-bargained-for response to the Court's interpretation will necessarily result in benefits to one or more political players in excess of their respective response costs, then that interpretation will not stand. And if the response to a given interpretation will necessarily result in benefits *less* than each political player's response costs, then that interpretation is safe from revision. But if the net cost-benefit determination depends instead upon the precise distribution of bargaining power among the political players,[32] the viability of that interpretation is ambiguous under the terms of the model.

Part II adds a layer of complexity to the analysis, expanding the unidimensional model in Part I into a two-dimensional model of the same hypothetical regarding a federal charter schools policy.[33] Instead of focusing solely upon federal policy regarding the ideal number of charter schools, Part II disaggregates the question into two separate components: (1) as before, federal policy regarding the ideal *number* of charter schools and (2) the appropriate level of federal *funding* for those schools, from low to high.[34]

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31. Lower-cost responders may have substantially greater relevant expertise than their higher-cost counterparts, be less busy, and care more about the particular issue relative to other issues. *See infra* Part III.

32. Or those players' reputation for reliability. *See infra* note 66 and accompanying text*; infra* Part I.B.2.c.iv.

33. For clarity of expression and ease of understanding, the model I present deliberately omits a few significant features of the federal law-making apparatus, including the veto override. These omissions do not alter the insights of the model in any appreciable way, though they may affect specific results in individual cases.

34. I assume that electoral concerns drive the preferences of the House, Senate, and

I expand the model into two dimensions for several reasons. First, most—probably all—legislation implicitly involves two or more discrete policy dimensions.[35] These dimensions may interact in interesting ways. Specifically, the introduction of a second dimension may allow the Court to play one dimension against another, sacrificing on one axis in order to obtain a net advantage by improving its position along the other.[36] Allowing for interactivity between dimensions brings the model one significant step closer to approximating the real world.

Relatedly, the addition of a second dimension will ultimately allow for consideration of a critical feature of our real-world political process: differences in *intensity* of preference along the various policy dimensions implicated by a particular legislative initiative. For the purposes of this foundational analysis, I assume that the players each value both dimensions—an ideal number of charter schools and a preferred federal funding level for charter schools—equally. Though this will not always be the case, it is not possible to explore the intensity-of-preference dynamic in a single-dimensional model.[37]

Because the House, Senate, and President each possess a veto over policy choices, agreed-upon statutory policies must generally fall within a range acceptable to all three players.[38] As in the unidi-

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President. Because members of the Supreme Court enjoy life tenure, they are assumed to exhibit their heartfelt preferences regarding the policy outcome under consideration. Again, this may not be the case for many judges most of the time, but modeling how things might play out if and when judges do act out of self-interest informs our broader understanding of the myriad of inputs that together produce judicial behavior.

35. These dimensions may be complementary or competing.

36. The same dynamic is present with respect to issues involving more than two policy dimensions, but graphical presentation is not feasible for those issues.

37. I will take up this issue in future work.

38. This is formally a veto player problem. Veto player theory generally refers to a game theoretical approach to political decision making in which one or more players possess the ability to veto any change to the status quo. *See, e.g.*, GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (2002) (explaining that individual political institutions possess "veto" power). In the context of the U.S. federal system, the House, Senate, and the President each possess at least limited veto power, as does the Supreme Court in matters of constitutional interpretation. *See id.* at 19, 226. For now, I assume that the President's veto power is absolute, rather than limited by the override provisions of Article I, Section 7 of the Constitution. If I were to relax that assumption, I would then need to introduce an additional set of preferences—those of the key members of the House and Senate whose votes would be necessary to override the President's veto. *See, e.g.*, Eskridge & Ferejohn, *supra* note 15, at 529-32.

mensional example, self-interested judges enjoy only limited power to move statutory policy within that circumscribed range in a world without transaction costs.[39] But the existence of response costs substantially increases judicial interpretive discretion in many contexts.

As in the unidimensional example, the model demonstrates that the range of potential judicial discretion is circumscribed, if at all, by the net cost-benefit analysis of the political players. The two-dimensional analysis also demonstrates that the Court can sometimes obtain "protection" of a sort for its more self-interested interpretations from one or more of the political players, by trading one dimension off for another.

Because each Supreme Court interpretation establishes a new status quo policy, Court interpretations closer to particular political players' preferences can circumscribe the policy range over which the political players will be able to agree to a legislative override. When the Court's interpretation lies close enough to one player's ideal policy to eliminate the possibility of net benefit for any political player contemplating a costly response, that interpretation will survive despite dissatisfaction from even relatively low-cost responders, and despite the fact that it lies outside the "natural" negotiation range for the political players. In the two-dimensional context, equivalent interpretations from the Court's perspective may well have very different implications with respect to the likelihood of a political response. I demonstrate this phenomenon graphically, showing that three interpretations that are equivalent from the Court's perspective yield three different political outcomes —a guaranteed legislative response, a guaranteed "safe harbor" for the Court, and an indeterminate outcome dependent upon political player bargaining power and credibility.[40]

In Part III, I offer amplifications and applications of the basic model. First, I offer a preliminary sketch of the *types* of costs that might factor into each political player's response calculus. Though there is room for debate and expansion, the basic components of a response-cost function are (1) process costs, (2) search and specificity costs, and (3) opportunity costs. Even if a player can precisely

39. *See, e.g.*, Gely & Spiller, *supra* note 15, at 264-65.

40. *See infra* Figures 12-17.

identify and articulate its ideal policy, the federal legislative process is inherently costly; the committee system alone produces enormous process costs for even the simplest legislation.[41] Moreover, it is often remarkably costly to articulate policy in deterministic, discretion-eliminating terms. Of course, some issues are more difficult to pin down than others; search and specificity costs will be relatively higher for those issues. Similarly, each political player must independently assess the relative importance of each objectionable judicial interpretation in comparison to that player's other goals; the less important the issue to a given player, the higher that player's opportunity costs of responding.

Second, I describe the ways in which interest groups can substantially affect the political players' response costs as well, even in a single-iteration game. A focused and motivated interest group can lower political response costs by supplying research, providing ready-to-wear draft legislation, or making the issue more salient, thereby lowering relative opportunity costs; such groups can also *raise* response costs by interfering in the response negotiation process. The influence of an interest group may be asymmetrical, depending on the political player with which the group is interacting. An interest group may be able to decrease or increase costs more effectively as to the House, Senate, or President, depending on the extent of that group's connections to that branch of government. In some cases, interest groups will be less able to affect outcomes because they will be strongest where their strength does them the least good.

Finally, I briefly explore the illustrative value of the model by applying it retroactively to three real-world contexts. I begin with a potential paradigm example in *Iqbal*, one of two recent, much-criticized Supreme Court civil pleading standard decisions to which Congress has yet to respond.[42] In *Iqbal*, the Court may have taken advantage of extremely high response costs to interpret an ambiguous provision restrictively, holding that all federal civil plaintiffs must demonstrate the "plausibility" of their claims to survive a motion to dismiss.[43]

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41. *Cf.* HART & SACKS, *supra* note 17, at 164-65 (noting that the number of problems the legislature deals with vastly exceeds the time needed to handle the issues).

42. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

43. *Id.* at 678, 684.

I then discuss the extent to which the Court can sometimes obtain additional interpretive space in the statutory context by merely *threatening* constitutional review; this is a particularly plausible account of the recent *NAMUDNO* case.[44] In *NAMUDNO*, the Court supported its expansive interpretation of the Voting Rights Act's "bailout" provision, at least in part, with a rather explicit threat that the underlying statute might be unconstitutional.[45]

I conclude by comparing *Iqbal* and *NAMUDNO* to *Ledbetter v. Goodyear Tire & Rubber Co.*,[46] a case that *did* ultimately result in a congressional override, albeit only after Congress and the White House had changed hands.[47] In that case, relatively *low* response costs arguably made it possible for the political branches to issue an override as the first legislative act of the 111th Congress, just nine days after President Obama took office.[48]

We cannot prove legislative intent definitively, of course, any more than we can conclusively pinpoint contemporaneous political preferences or the Court's underlying intentions in either set of cases. But we can tell a plausible story that in *Iqbal* and *NAMUDNO*, the Court successfully privileged its own outcome preferences over both the intent of the enacting Congress and the preferences of the then-current political infrastructure. *Ledbetter*, on the other hand, stands as an illustration of the kind of low-response-cost regulatory problem for which direct, contemporaneous deviation from political preferences would be impractical for the Court.

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44. 557 U.S. 193 (2009).

45. *Id.* at 205-06.

46. The *Ledbetter* decision is consistent with my model because Congress did not override it until President Obama took office in January 2009. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5(e)(3) (2006)) (enacted Jan. 29, 2009). Nonetheless, the ease with which the 111th Congress overrode the decision illustrates the relevant dynamics perfectly.

47. 550 U.S. 619 (2007), *superceded by statute*, Lilly Ledbetter Fair Pay Act.

48. Lilly Ledbetter Fair Pay Act (enacted Jan. 29, 2009).

## I. A UNIDIMENSIONAL MODEL OF STATUTORY INTERPRETATION

### *A. Introduction*

Government is complicated. At the federal level, even the simplest decisions ultimately involve hundreds of legislators and staffers, all with their own preferences and personalities. Moreover, seemingly disparate government decisions themselves are often intertwined with one another, sometimes in a hopelessly complicated and unpredictable fashion.[49] It might thus seem a fool's errand to attempt to reduce this extraordinary complexity into a highly simplified, stylized model of government behavior.

In some ways, it is. No simplified model can capture all of the nuances and complexities of government decision making; accordingly, no reasonably parsimonious model of government behavior can fully and persuasively explain any specific government outcome. At the same time, simplified models serve an enormously valuable function by helping to explain and understand government conduct in the aggregate. When a model generates empirically testable hypotheses, the results of the follow-up empirical studies supporting or rejecting those hypotheses further enrich our understanding of how government and law actually work.

*Good* models, even stripped down or highly stylized, capture the essence of political and judicial processes. No matter how complicated the internal politics of the House Committee on Agriculture are, for example, it is exceedingly unlikely that the Committee will ever report a bill that does not enjoy the support of the committee chair. Pivotal politics models leverage this reality by examining the preferences of the various pivotal players in the political process and then predicting results based upon the intersection of those preferences with key institutional features of the regulatory context.[50] In this Part, I present a single-dimension pivotal politics analysis of statutory interpretation incorporating political response costs.

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49. *See, e.g.*, Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950).

50. *See, e.g.*, KREHBIEL, *supra* note 14, at 20-48.

## *B. The Single-Dimension Model*

### *1. The Set-Up*

#### *a. No Transaction Costs*

Imagine a transaction-cost-free nation in which the Supreme Court is the only regulatory decision maker.[51] The Court's word is law, but it has inherited a set of preexisting legal and social policies from its predecessor Courts. Now focus on a single policy—for example, the nation's position on charter schools operating alongside traditional public and private elementary and secondary schools. In our hypothetical world, previous Supreme Courts were generally, if not absolutely, antagonistic to the idea of charter schools, especially relative to the current Court. If we label the inherited legislative policy as $L_i$, and the current Court's preference as *SC*, we can represent the status quo ante graphically by placing these labels at their appropriate locations along a continuum ranging from "Fewer Charter Schools" on the left to "More Charter Schools" on the right. Because the Court is the only political actor in this example, it will set policy at *x*, its own ideal point:

Figure 1: Inherited charter schools policy, equilibrium with Supreme Court only

51. Beyond the introduction of transaction costs and unless stated otherwise, standard modeling assumptions undergird the model. For example, for now we assume that each player knows all other players' ideal points, and that player preferences are unipeaked, linear, and Cartesian. This simply means that each player's satisfaction decreases as policy moves away from her ideal point in any direction, and that changes in player satisfaction can be measured by measuring changes in distance from player ideal points.

Now assume instead that there are two relevant political actors, the Supreme Court and a monolithic political apparatus *P* with veto power over any Court interpretation with which it disagrees. In this example, the political apparatus is less hostile to charter schools than the inherited legislative policy, but it is substantially less enthusiastic about them than the Court. When the Court interprets the inherited statute, it will be able to move policy away from the inherited policy and toward its own preferred outcome, but it cannot move past *P* without drawing a legislative override. Thus, the result of a judicial interpretation in a world without transaction costs will fall at *P*:

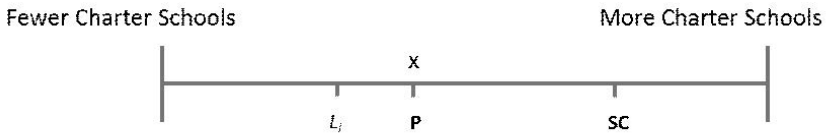


Figure 2: Inherited policy, Supreme Court and political apparatus (P); equilibrium at P

*b. With Transaction Costs*

The equilibrium changes when we introduce transaction costs into the mix. Even a political monolith faces response costs. For example, it may be difficult and costly for the political apparatus to articulate its preferences in detailed, deterministic, and thus discretion-eliminating terms. Or the issue of charter schools may fall far down on the list of the political apparatus's regulatory priorities. Whatever the source, it is almost certainly the case that the political apparatus would accept an interpretation that deviates to some degree from its ideal point without unlimbering the regulatory machinery; we can express this acceptable deviation in policy space terms as $p^*$.[52]

Put a different way, $p^*$ represents the political player's "transaction-cost-adjusted" indifference point. Similarly, the space between *P* and $p^*$ is that player's "indifference zone"; the political

52. In later Figures, I will use $h^*$ and $s^*$ to denote the House's and Senate's acceptable deviations, respectively.

apparatus is indifferent between an interpretation at $p^*$ (that it could correct to $P$ by incurring its response costs) and costless policy $P$. It follows that the political apparatus will *not* incur costs with respect to any interpretation within its indifference zone—that is, closer to $P$ than $p^*$.[53]

The distance between $P$ and $p^*$ thus represents the political apparatus's response costs, $r_p$,[54] reduced to policy space. As long as the Court's interpretation does not fall to the right of $p^*$, the political apparatus will not respond with overriding legislation; thus $p^*$ becomes the response-cost-adjusted equilibrium because it is the best the Court can do without provoking a political response:

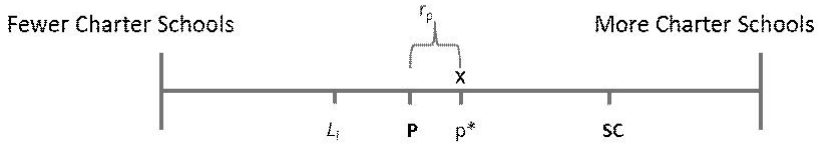


Figure 3: Inherited policy, Supreme Court and political apparatus with political response costs $r_p$; equilibrium at p*

*c. The Shape of the Override*

Throughout this Article, the terms "transaction costs" and "response costs" refer to the costs associated with crafting what is effectively a discretion-eliminating statutory regime. In other words, these are the costs associated with drafting a highly detailed, effectively deterministic statutory scheme that would prevent a future Court from "interpreting" its way to an outcome inconsistent with political preferences.

As a technical matter, of course, no statutory scheme is truly discretion eliminating in the context of judicial interpretation. If the Supreme Court were to declare that "black is white," we would not expect its members to be consumed by heavenly fire. Rather, a discretion-eliminating statute for our purposes is one that is

53. JOSEPH E. STIGLITZ, ECONOMICS 224-28 (1993).

54. In later Figures, I will use $r_h$ and $r_s$ to denote the House's and Senate's response costs, respectively.

sufficiently detailed and deterministic that it would be political suicide for the Court to reject the policy expressed thereby.

Put another way, a discretion-eliminating statute is one that "makes the unthinkable thinkable," by putting the political branches' few nuclear options—impeachment, funding cuts, jurisdiction stripping—on the table. A sufficiently detailed statute is effectively a precommitment strategy by the political players in a regulatory game of chicken; once such a statute is in place, the political branches will be forced to respond if the Court disobeys their direct commands.[55]

*2. Federalizing the Problem*

*a. The Players*

It complicates matters only a little when we disaggregate our hypothetical monolithic political apparatus into a more realistic model of the federal system. The federal law-making apparatus contemplates a distinct role for each of the three branches of government.[56] For a bill to become law, both the House and the Senate first must pass identically worded statutes.[57] The President may then sign the bill into law or issue a veto.[58] Once a statute is enacted, the judiciary possesses primary responsibility for interpreting the meaning of that statute, ostensibly in accordance with congressional intent.[59]

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55. In future work, I will take up the issue of half measures—that is, legislative responses that fall short of a full-blown discretion-eliminating congressional override. There are a number of possible half measures, ranging from subtle legislative threats to full-blown agency delegation (which would carry with it discretion-related risks of its own), but for now, it is more than enough to consider only the absolute response.

56. U.S. CONST. arts. I-III.

57. *Id.* art. I, § 7; *Lyrics to I'm Just a Bill*, LYRICSMANIA, lyricsmania.com/im_just_a_bill_lyrics_schoolhouse_rock.html. (last visited Feb. 14, 2013) ("Now I go to the House of Representatives, and they vote on me.... Then I go to the Senate and the whole thing starts all over again.").

58. U.S. CONST. art. I, § 7. Although the Constitution articulates a specific procedure for overriding a presidential veto (two-thirds vote of both houses of Congress), I omit this feature for simplicity's sake, instead treating the President's veto power as absolute. If we were to include the veto override feature, it would not change the core insights of the model, though it would affect the location of final outcomes in certain limited contexts.

59. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 193-95 (1978).

A useful model of federal statutory interpretation must therefore account for the preferences of at least four players: the House of Representatives, the Senate, the President, and the Supreme Court.[60] Of course, with the exception of the President, each of these players is actually a multimember body. Things get even more complex in the context of the Supreme Court because the process by which the Supreme Court grants certiorari is itself subject to strategic behavior.[61] At the same time, the pivotal politics approach allows us to simplify preferences with some confidence. At the end of the day, the people who matter most are the pivotal players within each body whose preferences must be satisfied to obtain the majorities necessary for action.[62]

*b. A World Without Transaction Costs*

In our hypothetical, the House, Senate, and President each have their own independent preferences with respect to the ideal number of charter schools. Suppose, for example, that the House is generally opposed to the notion of charter schools, so much so that its ideal point falls to the left of the inherited statutory policy. The Senate is somewhat more sympathetic to the idea, with an ideal point just to the right of the inherited position, and the President's ideal point falls still further to the right. But all three political players' preferences are well left of that of the Supreme Court. In a world without transaction costs, the political ideal point closest to

60. The model can be generalized to other contexts, for example individual states, but there is enough overlap in state and federal law-making procedure that focusing on the familiar federal system is appropriate.

61. *See* H.W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 11-12 (1991). Because of this complexity, I treat the Court as a monolith as well; for all intents and purposes, the point *SC* on the relevant preference maps represents the pivotal preference of the Supreme Court. I save the complexities of lower-court interpretations for later work.

62. *See generally* McNollgast, *Legislative Intent*, *supra* note 15 (analyzing pivotal players). As Gely and Spiller note, the median voter theorem does not hold precisely in multidimensional analysis, insofar as it is difficult if not impossible to identify a "median voter" within a body along more than one dimension. *See* Gely & Spiller, *supra* note 15, at 267. That said, a pivotal politics approach is still workable using a somewhat looser approach to identification of the relevant pivotal members. *See id.* at 267-68; *see also* McNollgast, *Positive Canons*, *supra* note 15 (applying a pivotal politics approach to two-dimensional spatial analysis).

the Supreme Court's (here, the President's ideal point *P*) defines the equilibrium:

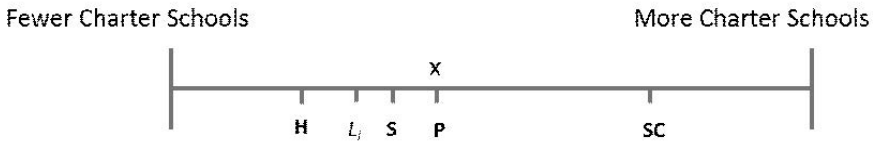


Figure 4: Supreme Court, House, Senate and President ideal points; Pareto-optimal for political players; equilibrium with no response costs

If the Court adopts interpretation *P*, neither the Senate nor the House can do anything to improve its lot. The President will be at her ideal point and will veto any attempt to move policy further to the left.

If the Court attempts to adopt any point to the *right* of *P*, the political players will respond with overriding legislation. If the Court was to err by adopting such a point, the precise location of the overriding policy would depend upon two things: (1) the relative bargaining power of the House, Senate, and President and (2) the distance between the offending interpretation and the presidential ideal point *P*. Because the President is a veto player, and because all three political players must agree in order to enact an override, the President need not accept any override policy that makes her worse off than the judicial interpretation.

But this is irrelevant to the Supreme Court, because *any* resulting override would be worse from its perspective than *P*. Under our informational assumptions, the Court will thus avoid the problem entirely by adopting interpretation *P*.

*c. A World with Transaction Costs*

As in Figure 3 above, now assume that each political player must incur response costs in order to generate deterministic, discretion-eliminating legislation in response to an objectionable Court interpretation. The dynamic is a bit different in the multilateral context. Mirroring real life to a significant degree, the model assumes that only one political player needs to expend its response costs to

produce the discretion-eliminating response. Assuming that the responding player correctly identifies a mutually agreeable policy—a function of relative political player bargaining power, among other things[63]—the other political players can free ride on that expenditure, agreeing to the response at effectively no cost to themselves.[64]

Importantly, the presence of multiple veto players means that a political player cannot generally anticipate that the expenditure of response costs will result in a statutory policy at that player's own ideal point. Rather, the final legislative policy will be a function of response bargaining between multiple veto players. Thus, the length of a political player's inaction zone represents the "amount" that player must "spend," in issue-specific policy space terms, to secure a discretion-eliminating legislative override (assuming agreement from the other relevant veto players).[65] That player will only spend that amount if it expects to receive more than its expenditures in return. The following examples illustrate the analysis.

*i. An Untenable Interpretation*

Thus, the operative question in a transaction-cost-adjusted world is whether *any* of the three political players has an incentive to expend response costs, given the location of the judicial interpretation on the continuum and the other political players' preferences and cost functions. Returning to our hypothetical, first consider a judicial interpretation that will necessarily result in a congressional override. In this example, the House ideal point, $H$, lies significantly to the left of all other players' ideal points, and the House's response costs, $r_h$, are relatively low; in other words, the distance between $H$ and $h^*$ is small. The Senate's response costs are somewhat higher, but the President's response costs are similar to those of the House:

63. *See, e.g.*, Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998).

64. There are, of course, a variety of ways in which the political players might attempt to gain advantage in the negotiation process, but the single-payment assumption captures the essence of many—if not most—interactions.

65. For the purposes of this Article, I also assume that half measures are infeasible—that is, that the legislature and executive cannot obtain somewhat better results at discounted cost. I will relax this assumption in future work building on the basic model.

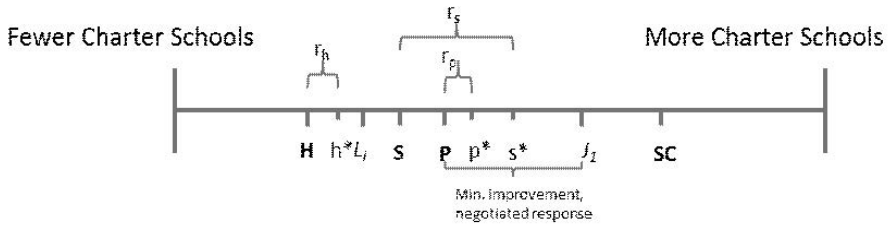


Figure 5: Supreme Court, House, Senate and President; equilibrium with response costs; untenable interpretation $J_1$

If the Court attempted to fix policy at $J_1$, the House would respond, because its net benefits from a statutory response would necessarily be greater than its response costs. In a second-stage negotiation, the House would do no worse than *P*, and then only if the President held all of the bargaining power as between the political players. Thus, the *minimum* improvement for the House is the distance from $J_1$ to *P*; because its response costs are substantially lower than its minimum improvement, it will respond, and interpretation $J_1$ is untenable.

Though the House's cost-benefit analysis is dispositive of the issue, it is worth exploring the calculus facing the Senate and President in Figure 5 as well. The Senate's costs, $r_s$, are substantially higher than the other players'. As a result, it is unclear whether the Senate would respond to interpretation $J_1$. If the Senate holds all of the bargaining power such that the response lands at its ideal point, *S*, a response is worth it; it would expend significantly less than its total benefit from the response. The same is true, albeit to a slightly lesser extent, if the President holds all of the bargaining power such that the response fixes policy at *P*. But if the House holds all of the bargaining power, the Senate would improve its position by less than its response costs; it would therefore stay on the sidelines if the House were particularly powerful relative to the other two political players.

Despite her much lower response costs, the President's calculus is similar, primarily because the judicial interpretation in question lies much closer to her ideal point. As with the other players, the

President will be willing to expend her response costs in pursuit of any response equilibrium that improves her final position by more than those costs. This will be true for much of the potential agreement range between *H* and *P*, but the distance between *H* and *P* is virtually identical to the distance between *P* and $J_1$. The President will not be willing to expend her response costs, $r_p$, to end up in exactly the same place she was before; she will only incur costs if the final equilibrium lies closer to her own ideal point from *H* by an amount equal to or greater than $r_p$.

*ii. A Safe Interpretation*

Some cost and preference distributions create substantially more space in which the Court can fix policy without drawing a legislative override. Consider our charter schools debate in a slightly different set of circumstances. Here, the political players' absolute preferences are identical to those in Figure 5, but both their cost functions and the interpretation selected by the Court are somewhat different. In particular, the House faces enormously high response costs; the Senate's and the President's are only modestly greater than in the previous example.

The Court's interpretation is also different; in this example, the Court selects a policy, $J_2$, outside of the range over which the political parties would negotiate a response, but substantially closer to *P* than in Figure 5:

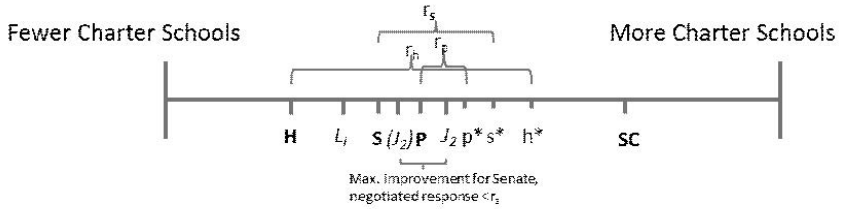


Figure 6: Supreme Court, House, Senate and President; equilibrium with response costs; safe interpretation $J_2$

Here none of the political players will respond, because each player's *best-case* scenario—policy fixed at that player's own ideal point—is too costly. Interpretation $J_2$ lies *inside* all three political

players' indifference ranges; none of them will expend more than they get in return.

*iii. An Indeterminate Interpretation?*

Sometimes it will not be possible for the model to determine the result of a particular interpretation without adopting heroically unrealistic assumptions about the Court's political acumen.[66] In particular, when the decision to respond to a repetitive specific interpretation comes down to an assessment of relative bargaining power as to all three political players, the outcome is simply too uncertain for a risk-averse Court to chance.

Consider again the same distribution of absolute preferences, but with a different set of cost functions. In Figure 7, the House faces the highest response costs, though they are somewhat lower than in the previous example. Senatorial and presidential costs are somewhat lower and substantially lower, respectively, and the Court is considering an interpretation, $J_3$, well to the right of all three political players' ideal points:

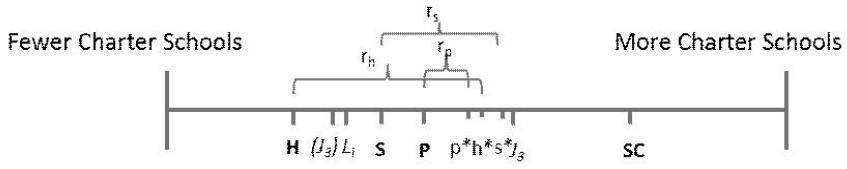


Figure 7: Supreme Court, House, Senate and President; equilibrium with response costs; indeterminate interpretation $J_3$

It is not clear whether interpretation $J_3$ will invite a congressional response. Because the President will be unwilling to accept any

66. In later work, I will analyze the ways in which uncertainty of various forms might affect the analysis; however, it is at least plausible to assume that the Court knows generally how the House, Senate, and President would likely come down on a particular issue. It is similarly plausible that the Court has some rough idea of the costs attendant with a political response. It is far less plausible to assume that the Court is able to assess with any reliability the distribution of bargaining power among the House, Senate, and President with respect to any given issue.

interpretation that makes her worse off than $J_3$, the political players will be able to agree to a response only between ($J_3$) and $P$.[67] Given this limitation, it is not clear that either the Senate or the President will find it worthwhile to incur response costs.[68] The Senate is constrained by its own high response costs; the resulting policy would need to be very close to $S$, albeit on either side, in order to justify expenditure of $r_s$. Similarly, the President's relatively lower response costs do not guarantee a response. The President's benefit from an override will be smallest because her ideal point is closest to the proposed interpretation; she will only incur her response costs, $r_p$, if the resultant policy lies closer to her ideal point than $p^*$.[69] Thus, depending on the bargaining power distribution among the parties, it may be that no political player has an obvious incentive to respond.[70]

### *iv. The Problem of Political Promise Keeping*

The uncertainty inherent in Figure 7 is largely a function of the simplifying single-iteration limitation I have imposed for clarity's sake. If instead the political parties are able to bargain credibly with one another over time, then any cost distribution capable of yielding net benefits for one or more political players should produce a statutory response.

Consider the Senate's situation in Figure 7, for example. Because its response costs are relatively high, the Senate will be willing to

67. The point ($J_3$) represents the leftward equivalent of $J_3$ from the President's perspective. She will veto any response to the left of ($J_3$).

68. The House will not act because its best-case scenario, ($J_3$), offers insufficient benefit to cover its costs.

69. That equilibrium would of course lie to the left of $P$ rather than the right. It is the absolute distance that matters.

70. Even if every player's cost function makes bargaining power relevant to the response decision, it does not necessarily follow that the outcome is indeterminate. It is possible that all policy space on the continuum—that is, the policies resulting from all possible distributions of bargaining power—will be associated with one or more players who will find it worthwhile to respond if policy is fixed there. Assuming the political players know the distribution of bargaining power ex ante (a somewhat less objectionable claim than assuming the *Court* knows the distribution of political bargaining power), these situations will result in a response, even though each player's own calculus will be affected by bargaining power assessments. In Figure 7, there exists an "open space" such that if bargaining power fixed policy within that range, *no* player would find it worthwhile to incur response costs, but it is too complex to display graphically.

incur those costs only in return for a final equilibrium relatively close to its ideal point. And in a single-iteration world, the sunk cost phenomenon would limit or eliminate the Senate's willingness to incur costs unless it could be guaranteed that result.

Assume that the Senate is a relatively weak bargainer, such that in a costless negotiation, policy would be fixed at $J_3$. Notwithstanding that fact, the House and President would both be able to get something for nothing if the Senate offered to pull the laboring oar and incur response costs in return for a policy that falls right on the edge of the Senate's response zone. That policy would be better for both the President and the House than $J_3$, completely free of charge.

However, the mechanics of the legislative process present a problem for the Senate. Once the Senate has incurred its response costs—that is, engaged in the necessary research, drafting, agenda shuffling, et cetera—there is nothing to stop either the President or the House from attempting to nudge the legislative bargain further in their preferred direction. At that point, the Senate's initial response costs are sunk. If the other players can credibly threaten to scuttle the deal, the Senate will have little choice but to go along, lest it find itself in the worst possible situation: having expended its response costs in return for *no* improvement in policy. Reasoning backward from that possibility, the Senate is unlikely to incur its response costs in the first place.

This phenomenon can be avoided, of course, if we assume that the political players can make credible ex ante commitments to one another. In the single-iteration context, each player's goal is to maximize its own policy satisfaction as to the interaction in question, without regard to future consequences. But in the real world, reputational constraints and repeat player phenomena would eliminate, or at least mitigate, the risk of one-off betrayal. In a repeat player world, the availability of net benefits for at least one political player should ultimately produce a legislative override to an objectionable interpretation.

#### *d. On the Importance of Backward Induction*

Finally, note that the foregoing analysis assumes a risk-averse Supreme Court—that is, a Court unwilling to face legislative

override—with knowledge of the other players' preferences and cost functions. To the extent those assumptions hold, we would not generally expect to see the Court prompting a legislative override with its statutory interpretation opinions.[71] Instead, the Court would likely use its knowledge to avoid the response entirely, picking the best possible interpretation, from its perspective, that would ultimately be safe from revision.[72] This principle applies to the two-dimensional context as well.

## II. EXPANDING THE MODEL TO TWO DIMENSIONS

Up to this point, I have assumed that statutory interpretation takes place along a single policy dimension—in the examples, along a preference continuum from fewer to more charter schools. But single-dimension analysis is inherently limited.

Most statutory schemes inherently involve balancing of at least two, and often many more, policy dimensions. For example, a statute may be attempting to simultaneously eliminate racial discrimination in employment[73] while protecting small businesses from overly burdensome regulation.[74] Or, as in my hypothetical, a generalized preference for fewer or more charter schools may actually be a combination of two preferences—an abstract preference for the ideal *number* of such schools and a preference for higher or lower levels of federal funding for those schools. The dimensions with which we may be most concerned in the statutory interpretation context are not always purely political dimensions. The involvement of judges in the analysis offers further support for multidimensional analysis because many statutory interpretation cases present specifically judicial policy dimensions.[75]

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71. *See* G. Dosi & M. Egidi, *Substantive and Procedural Uncertainty: An Exploration of Economic Behaviours in Changing Environments*, 1 J. EVOLUTIONARY ECON. 145 (1991) (discussing different sources of uncertainty and how entities act in response to uncertainty). As we add dimensions, the possession of information regarding preferences and costs may be insufficient to allow the Court to plot a course because it is cognitively limited. In other words, could the Court *really* do semidefinite programming?

72. *See id.* at 149.

73. *See* 42 U.S.C. § 2000e-2(a) (2006) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin).

74. *See id.* § 2000e(b) (limiting application of Title VII to larger employers).

75. In this foundational paper, I assume that each player values each dimension equally. I will relax this assumption in future work; that change will be particularly important when

The addition of a second dimension to the analysis significantly enriches the discussion in another important way. Specifically, the more complex interplay of preferences and costs in two or more dimensions will sometimes allow a self-interested Court to trade losses in one dimension for gains in another. For example, when conditions are right, the Court can improve its overall position by selecting an interpretation that gives the nearest political player more of what it wants relative to other players. This position offers the Court protection from revision that would not be available if the Court selected other dimensional combinations that are functionally equivalent from the Court's perspective.

That said, large segments of the unidimensional analysis in Part I translate more or less directly to the two-dimensional context. I will not recapitulate that analysis here. Rather, I present only a small subset of the two-dimensional analysis materials that illustrates a key difference between the two-dimensional approach and its single-dimension analogue.

### *A. Introduction by Way of a Charter School's Backstory*

Part I introduced the Article's primary illustrating device: a hypothetical debate about federal charter schools policy. In the single-dimension context, it was not necessary to provide much in the way of background on the hypothetical, but the two-dimensional analysis is actually simplified by the introduction of additional hypothetical facts:

> In 2011, Congress passed, and the President enacted, a federal charter schools statute that substantially increased the amount of federal funding available to charter schools relative to the amounts available under the No Child Left Behind Act and the Elementary and Secondary Education Act. The statute also attempts to increase the absolute number of charter schools by limiting the amount of federal funding for which any individual charter school is eligible, and by providing short-term tax incentives to new for-profit charter schools. But the political

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we consider judicial policy dimensions—for example, workload, judicial independence, et cetera—because courts are likely to value such matters differently than their political counterparts.

branches disagreed as to the likely effect of individual-facility funding restrictions on the ultimate number of charter schools. The text of the statute reflects that friction, prohibiting, without explicit definition, only "excessive" funding of individual schools. The statute also fails to specify federal funding levels, instead expressing "authorized" expenditures as a percentage of "annual gross domestic profit (GDP)" and leaving unresolved whether expenditures are mandatory or discretionary. Lower court interpretations were jumbled.

Ten years later, the Supreme Court granted certiorari on a class action challenge to the current presidential administration's execution of the statute. The class consists of elementary and secondary students in failing public school districts who claim that the Department of Education's conservative interpretation of "annual GDP" and its refusal to expend all "authorized" funds violate the statute. According to the plaintiffs, proper application of the statute would encourage competition in the provision of educational services and would provide plaintiffs with additional educational opportunities in the form of more federally funded charter schools.

Figure 8 depicts the absolute preferences of the current relevant players in two dimensions[76]:

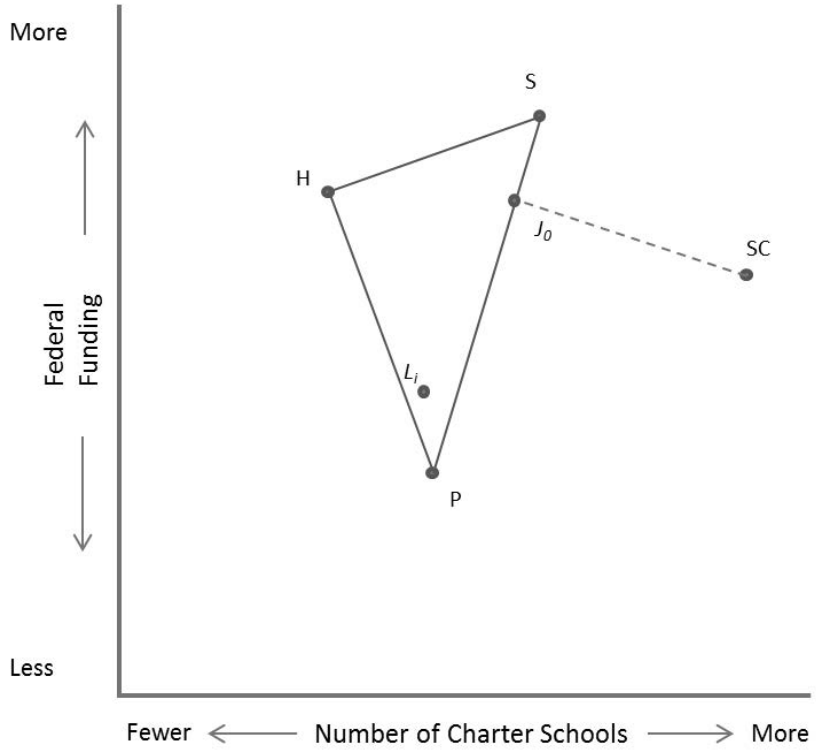


Figure 8: House, Senate, President and Supreme Court ideal points in two dimensions; transaction-cost-free equilibrium $J_0$

Compared to the current policy, $L_i$—an amalgamation of the "deal" reached when the statute was enacted, lower court interpretations of that statute, and subsequent executive branch enforcement activity—the President prefers roughly the same number of charter

76. These preferences are identical to those depicted in the zero-transaction-cost analysis above. *See, e.g.*, *supra* Figure 2.

schools, but as a fiscal conservative, she would like to see less federal funding. By contrast, the more consistently liberal House prefers greater federal funding, and thus control, but with relatively fewer charter schools. The Senate prefers both more schools and higher levels of funding relative to the initial statute.

By contrast, the Supreme Court is something of an outlier. Perhaps in service to its commitment to federalism, the Court would prefer a substantially higher number of charter schools than even the Senate, but would prefer only an intermediate level of federal funding, in between the level desired by the budget-hawk President and a more fiscally liberal Congress.

If we ended the story there, the analysis would proceed in much the same way as the transaction-cost-free unidimensional analysis presented in Part II.[77] But instead of concerning itself with the arrangement of the three political players' preferences on a line, cost-free two-dimensional analysis is concerned primarily with the triangle created by connecting points *H*, *S*, and *P*, *ΔHSP*. This triangle represents the entire policy space in which the political players would be able to fix a new policy were they to negotiate a new statute—whether in response to an objectionable judicial interpretation or otherwise.

A player attempting to improve upon any status quo position on or within the triangle can only do so at the cost of one or both of the other players; because all three can and will veto any change that worsens their lot, no change is possible once the existing policy is located in or on the triangle. The self-interested Supreme Court thus has a simple job in a cost-free world: to select the interpretation on the edge of the triangle that is closest to its own ideal point.[78] Any point *outside* the triangle will prompt a response from the political branches, and any *other* point on or inside the triangle needlessly cedes ground the Court does not have to surrender. In Figure 8, the Supreme Court's optimal zero-response-costs interpretation is located at point $J_0$.

77. For a thorough treatment of these issues *without* transaction costs, see Spiller, *supra* note 16; Spiller & Gely, *supra* note 16.

78. *See* Spiller & Gely, *supra* note 16, at 467.

But absolute preferences are only part of our story, and perhaps the less important part as explained in these additional hypothetical facts:

> Though the continued poor performance of U.S. public schools makes the issue electorally important to both houses of Congress and the President, each political player would face different costs if it were to take it upon itself to respond to an objectionable statutory interpretation from the Court.
>
> The House's response costs, $r_h$, are lowest, because a subcommittee of the House Committee on Education and the Workforce has recently begun preliminary work on a revised federal charter schools statute. Its work is far from complete, but it has something of a head start on its counterparts in the Senate and at the White House.
>
> The Senate's costs, $r_s$, are relatively higher. Though subcommittees of the Senate Committee on Health, Education, Labor & Pensions sporadically consider related issues, they have little current expertise in this area. Moreover, the federal charter schools policy debate is simply a little less important to the Senate, relative to other matters to which it is currently devoting its attention.
>
> The President's response costs, $r_p$, are highest. Having just taken office several months earlier, she only recently began filling political positions within the Department of Education. Those appointees are still getting up to speed, and charter schools have not historically garnered much attention from career Department of Education employees. Moreover, the President is contending with a host of significant foreign policy problems she inherited from her predecessor, and after a narrow electoral victory, she is wary of an early political fight with the Supreme Court.

Figure 9 presents those costs in graphical terms:

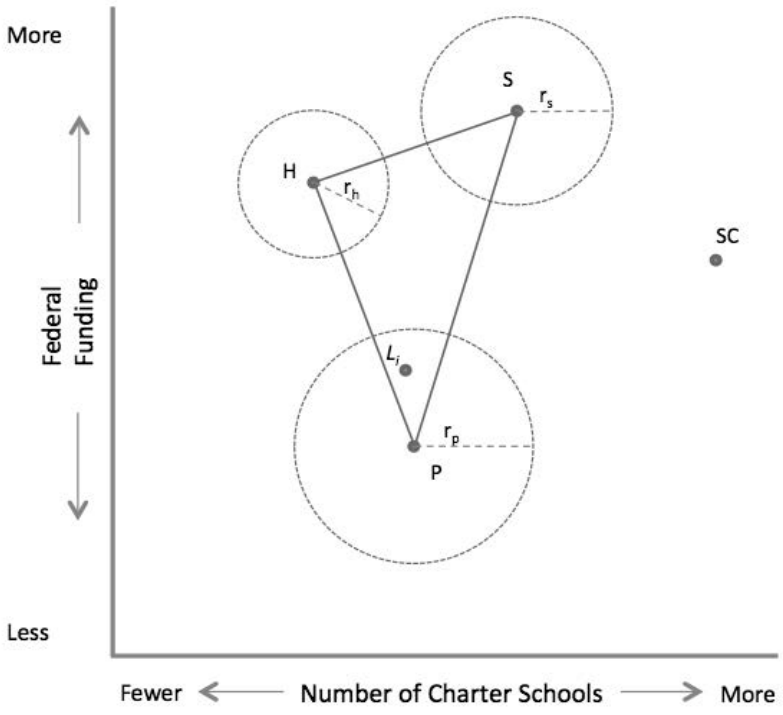


Figure 9: House, Senate, and President ideal points with response costs

*B. Transaction Costs in Two Dimensions*

*1. The Circular Inaction Zone*

As in the unidimensional context, the two-dimensional model aggregates each political player's response costs into a single response-cost function.[79] But in Figure 9, the cost functions are circular rather than linear. To some degree, the circular shape is a

79. *See supra* Figures 5-7 and accompanying text.

function of our operating assumptions. As before, we assume that as we move away from a given player's ideal point, that player's satisfaction goes down. We also again assume that we can measure changes in player satisfaction occasioned by a given policy shift by measuring the associated change in distance to player ideal points.[80] In the two-dimensional context, we further assume that both preference dimensions, the number of schools and the level of federal funding, are of equal importance to each player. Given these assumptions, it is possible to represent each player's response-cost function graphically as a circular "inaction zone" centered upon that player's ideal point.[81]

More precisely, the *radius* of each player's inaction zone represents that player's response costs translated into policy space terms. This may seem a strange idea at first blush, but the intuition is simple: there is some policy distance from each player's ideal point into which a judicial interpretation can fall without prompting a discretion-eliminating response from that player. Each player-specific inaction zone represents that distance relative to that player's ideal point. The larger the circle defining a player's inaction zone, the higher that player's response costs.

In a frictionless world, the political players would, perhaps grudgingly, accept anything within the triangle as Pareto-optimal but would respond to anything outside of the triangle. In a more realistic world, a point outside the triangle but within a given player's inaction zone is not worth the effort of a discretion-eliminating response from that player, though that same interpretation may prompt another player to respond.

The perimeter of each inaction zone is an indifference curve of sorts. The player is not genuinely indifferent between its ideal point and points within or on the perimeter of its inaction zone; rather, the player is indifferent between (1) any point on the perimeter of its inaction zone and (2) *incurring response costs* to obtain its ideal outcome. Thus, in Figure 9, even if a political player is *guaranteed* that the end result will be a discretion-eliminating statute located

80. That is, preferences are again assumed to be unipeaked, linear, and Cartesian. *See supra* note 51.

81. In future work, I will assess the implications that occur when political players do *not* value policy dimensions equally. Among other things, the relevant inaction zones would no longer be circular, but rather ellipsoidal.

precisely at its own ideal point (a result far from guaranteed in many political response negotiations involving multiple players), that player will not incur response costs if the judicial interpretation falls on or inside its inaction zone.

The approach can thus be summarized as follows: Faced with a statutory interpretation fixing policy outside the political players' Pareto triangle, those players will individually assess whether the preference and cost dynamics they face justify a legislative override. They will override the Court's opinion legislatively if one or more of the political players finds it worthwhile to incur its individual response costs. If they act, one player will incur response costs, generating a statute that (1) is mutually preferable to the judicial interpretation for all three political players and (2) effectively eliminates all judicial discretion. This in turn dictates that a self-interested Supreme Court will select a judicial interpretation that maximizes its own utility from among the set of interpretations that will not provoke a legislative response.

*2. Measuring Costs and Benefits in a Two-Dimensional World*

Because the players' utility functions are linear and because they value each dimension equally, we can use each player's inaction-zone radius as a yardstick against which to measure the benefits of a potential legislative override to that player. Some of these measurements are easy. When a particular statutory interpretation lies within a player's inaction zone, for example, that player will make no response, period. It would by definition cost more for that player to fix the Court's ruling than it would be worth in policy improvement terms, even if the resulting statute established policy precisely at the player's ideal point. The same player may well free ride on another player's investment by assenting to a Pareto-superior response, of course, but it will not do the heavy lifting.

Other comparisons are more difficult. For example, when a judicial interpretation falls outside of a player's inaction zone, the player will incur the expense of responding only if that expenditure results in some *net* improvement in that player's position. This is in turn a function of the result of the response negotiation between political players, a far more complicated analysis. But we can still depict this situation graphically. As in the single-dimension model,

if a player's response costs—the radius of that player's inaction zone—are higher than the benefits, measured as the *reduction* in absolute distance from the player's ideal point resulting from the response, then the player will not act. If that player's response costs are *lower* than the benefits, the player will respond. Thus, if the dynamics of the interaction suggest that very little gross improvement is possible for a particular player, that player may not be willing to incur response costs, even though the interpretation in question falls far outside its inaction zone.

The "gross improvement" question is complicated. Every judicial interpretation establishes a new status quo, and that status quo serves as an anchor of sorts for every veto player. Because every player must assent to enact overriding legislation, no player will accept a final result worse from its own perspective than the interpretation's new status quo. Thus, depending upon its location, a judicial interpretation may change the range of possible legislative responses such that the full Pareto triangle is no longer available for negotiations among the political players. Veto players will not be willing to worsen their situations by accepting a renegotiated policy inferior to the new status quo imposed by the judicial interpretation, even if they might have agreed to that policy in the absence of a preexisting policy.

Finally, it is important to note the limits of the cost-to-policy-space transformation. At the end of the day, there is some real, quantifiable cost—in dollars, time, et cetera—to crafting a discretion-eliminating response to an off-track judicial interpretation. By transforming that real cost into policy space terms, I am simply depicting the absolute *improvement* in policy that a given player would have to see in order to justify incurring that real cost.[82]

82. The simplifying assumptions of the model mask the implications of this limitation somewhat. In particular, the circularity assumption—that all players value both dimensions equally—allows for a purely Cartesian analysis. If we relax the circularity requirement, the math becomes substantially more difficult, although the underlying point remains the same.

### *C. A Special Feature of Two Dimensions*

#### *1. Introduction*

The preference distributions and response costs depicted in Figure 9 demonstrate a unique feature of multidimensional analysis: a self-interested Supreme Court can sometimes play the political branches off one another.[83] Specifically, the Court can pick among multiple judicial interpretations of equivalent value.[84] Put another way, a Court interested in testing whether it can obtain a particular level of net utility can select any point of equal distance from the Court's own ideal point. This in turn means that the Court can trade off one dimension for another, thereby obtaining "protection" from a nearby political player in the form of an interpretation more attractive to that player than other combinations that are utility equivalent from the Court's perspective.

In the following examples, I present three possible judicial interpretations of the charter schools statute. In some ways, the analysis parallels that presented in the unidimensional analysis, in that I identify an "untenable" interpretation, a "safe" interpretation, and an "indeterminate" interpretation.[85] In the unidimensional context, however, each of the three interpretations considered was of substantially different value to the Court.[86] Moreover, the unidimensional political players' cost functions were different in each diagram.[87]

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83. Again, although I describe the Court as acting deliberately and strategically, the analysis generally applies even when, as is probably more often the case, the Court's off-track opinion is a function of mistake rather than malevolence. If the Court deviates because it is mistaken about political preferences, it admittedly will not have engaged in backward induction to pick a "safe" interpretation. Even in that situation, however, a "mistaken but durable" interpretation tells us a lot about the political players' response costs.

84. Conceptually, this is similar, if not directly analogous, to the "production possibility frontier" familiar to undergraduate economics students. *See* Urs Luterbacher & Pierre Allen, *Modeling Politico-Economic Interactions Within and Between Nations*, 3 INT'L POL. SCI. REV. 404, 409-10 (1982). Here, though, the Court selects interpretations from among different combinations of guns and butter (or number of and funding levels for charter schools) that are equivalent from the Court's perspective.

85. *See supra* Part I.B.2.c.i-iii.

86. That is, closer to or farther from the Court's ideal point. *See supra* Figures 5-7.

87. *See supra* Figures 5-7.

In the two-dimensional context, by contrast, the three interpretations I present are of *equal* value to the Court, and these three different interpretations are untenable, safe, or indeterminate despite the fact that the underlying preference and cost dynamics are also the same in each case. The only thing that changes is the interpretations considered by the Court from among a set of what it considers functionally identical alternatives. The following two-dimensional examples thus demonstrate a self-interested Court's enhanced ability to privilege its own preferences in a multidimensional context.[88]

In a world with transaction costs, the Court will consider only interpretations that improve its outcome over its transaction-cost-free optimum point, $J_0$, in Figure 8. Thus, the universe of interpretations the Supreme Court will consider is the shaded disc in Figure 10 below, representing all points closer to *SC* than $J_0$:

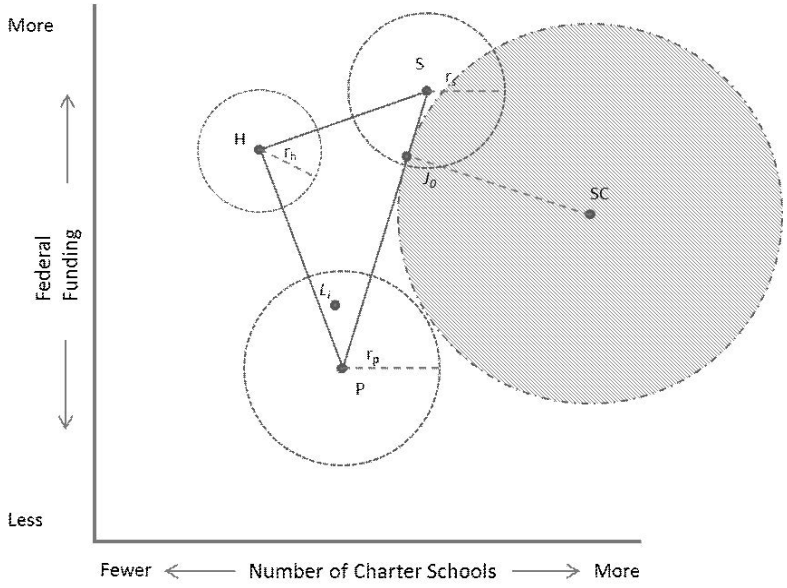


Figure 10: Range of possible improvement for Court over $J_0$ baseline

88. This is subject to the Court's own cognitive limits. *See supra* notes 66, 71 and accompanying text.

Whether the Court could sustain an interpretation outside the shaded circle is irrelevant because any such interpretation would by definition be inferior to its best safe interpretation, $J_0$. Thus, if the Court tries to take advantage of congressional or presidential response costs, it will do so only if it can set policy within the shaded disc. All else equal, it will select the point closest to *SC* within the circle that is also durable.

Two factors complicate any attempt to depict graphically the actual outcome of a particular statutory interpretation scenario. First, recall that the specific outcome of any response negotiation is often a function of the relative bargaining power of the House, Senate, and President. Thus, we can sometimes identify only a *range* of possible outcomes within *ΔHSP* that are on the table in that negotiation, rather than a final, specific result.[89]

Second, more aggressive and less realistic informational assumptions do not solve that informational problem. Each possible Court interpretation in the policy space establishes a new and potentially different status quo backdrop in whose shadow the House, Senate, and President must negotiate the terms of their response. Even if the Court could identify the precise mix of bargaining power among the political players for the issue under consideration, it would still have to cycle through all possible interpretations to identify its utility-maximizing safe interpretation.

Thus, even if we assume that the Court is capable of identifying the balance of power between the House, Senate, and President such that it can predict with precision the outcome of any statutory renegotiation given a particular interpretation,[90] a spatial model can predict only whether a response to *that particular interpretation* will provide net benefits to any player if it incurs response costs. Given a robust and reliable understanding of the bargaining

89. There are simpler cases for which it is possible to identify either specific, judicially ideal interpretations, or at least a true "safety zone" in which the Court can improve upon $J_0$ without any risk of response. *See infra* Part II.C.2.b.

90. This leaves aside the very real difficulties in operationalizing that knowledge in the context of a three-party negotiation over an irregularly shaped two-dimensional policy space of the sort this analysis typically yields.

power issue, we could identify the best possible statutory interpretation(s) from the Court's perspective by trial and error; but there is no easy way to identify such point(s) graphically.[91]

Nonetheless, the inability to predict a final equilibrium spatially does not render the spatial approach useless. By assessing the political players' response calculus for specific points in the policy space, the spatial model can demonstrate the potential for increased judicial discretion in the multidimensional context.

*2. Three Differently Identical Interpretations*

In the two-dimensional context, a self-interested Supreme Court can sometimes use the interplay of those dimensions to its benefit. In the examples that follow, the Court is considering three possible interpretations of the hypothetical federal charter schools statute.[92] Importantly, each of these interpretations is equivalent from the Court's perspective; though they represent different mixes of funding levels and generalized numerical preferences, each is the same distance away from *SC*, and accordingly the Court would be equally satisfied with any of the three.

The first interpretation under consideration, $J_1$, would significantly increase federal incentives to establish charter schools relative to the inherited policy but would decrease federal funding levels substantially for those schools relative to the status quo. To flesh out the hypothetical a bit, imagine interpretation $J_1$ holding that the Department of Education retains substantial discretion to determine whether to disburse "authorized" funds to charter schools (thus decreasing federal funding levels relative to the status quo) while simultaneously defining as presumptively "excessive" any amount of funding for a single facility greater than $3000.00 per

91. In future work, I will explore solutions to this problem. In general terms, this scenario presents a problem for "semidefinite programming," a subset of convex optimization theory. Lieven Vandenberghe & Stephen Boyd, *Semidefinite Programming*, 38 SIAM REV. 49, 49 (1996). Applying semidefinite programming techniques permits the solution of far more complex multidimensional problems and also allows for consideration of elliptical cost functions, such as variations in the ways different players value the different dimensions of the problem. But it also introduces a level of technical complexity well beyond the scope of this Article.

92. *See supra* Part II.A.

authorized student (thus tending to increase the absolute number of charter schools/charter school students).

By contrast, the second interpretation, $J_2$, would significantly *increase* federal funding levels for charter schools, perhaps by holding that the Department of Education must justify any failure to expend "authorized" funds in some fashion. It would also tend to increase the number of charter schools, but not by so much as the first interpretation. This interpretation might hold that funding of more than $4000.00 per authorized student is presumptively "excessive" under the statute.

Finally, the third possible interpretation, $J_3$, falls somewhere in between the first two interpretations. It would encourage a small increase in federal funding by nudging, but not requiring, the Department of Education to expend "authorized" funds,[93] while deciding that more than $3500.00 per authorized student in federal funding is presumptively "excessive." A graphical depiction of these alternatives appears in Figure 11 below:

93. The Court is particularly good at nudging. *See infra* Part III.C.2.

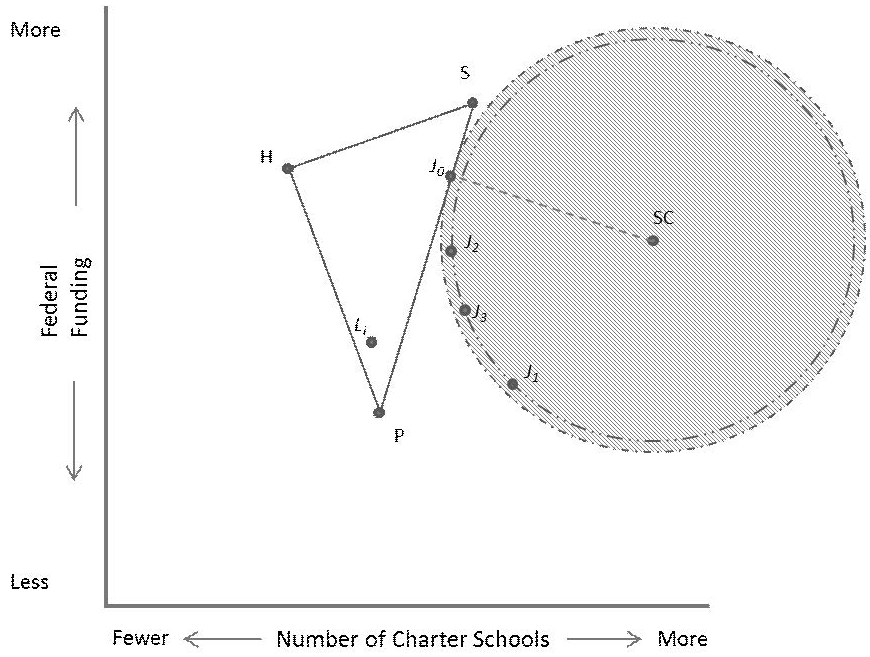


Figure 11: Interpretations $J_1$, $J_2$, *and* $J_3$

Note that all three interpretations are better from the Court's perspective than the definitionally safe interpretation $J_0$.[94] Moreover, all three points are equivalent from the Court's perspective: the Court would derive the same utility from each interpretation because each is the same distance away from the Court's ideal point.[95]

94. In other words, they are closer to *SC* than $J_0$. This also necessarily means that all three fall outside of *ΔHSP*, and that all three would be untenable in a world without response costs.

95. Technically, all three points lie on the same "isopreference" circle centered upon point *SC*. *See* Wayne S. DeSarbo et al., *A Parametric Multidimensional Unfolding Procedure for Incomplete Nonmetric Preference/Choice Set Data in Marketing Research*, 34 J. MARKETING RES. 499, 500 (1997).

The Court's perspective, however, is not the only one that matters. Once we take the other players' preferences and incentives into account, we find that each interpretation yields a different result. Application of the model demonstrates that the Court would be *unable* to sustain interpretation $J_1$ regardless of House/Senate/President bargaining power dynamics. The first interpretation would necessarily lead to a statutory override spearheaded by the House, whose worst-case response outcome would still justify incurring response costs.

The Court would, however, be able to sustain interpretation $J_2$, again regardless of political player bargaining power. The political players cannot override the second potential interpretation because no political player's best-case scenario justifies expenditure of response costs.

Finally, the third interpretation offers an indeterminate outcome; the Court's ability to select that policy would depend upon the precise distribution of bargaining power among political players and the intrinsic dynamics of the political players' negotiations. Under some possible distributions and assumptions, interpretation $J_3$ would draw no legislative response, whereas under others it would. Under still others, it would be impossible to predict the outcome in the context of a single-iteration interaction.

*a. An Unworkable Interpretation*

Point $J_1$ represents a policy within the overlap region that is from the Court's perspective somewhat better (closer to *SC*) than policy $J_0$, though it represents a rather significant shift in dimensional priorities compared to the Court's zero-response-cost safe-haven interpretation. Interpretation $J_1$ would significantly reduce federal funding for charter schools relative to $J_0$, but it would simultaneously increase the number of charter schools somewhat.

To determine whether this interpretation is sustainable, we must first identify the range of possible political response outcomes. This range is in part defined by the now-familiar Pareto triangle connecting *H*, *S*, and *P*; but it is also influenced by the location of $J_1$ itself. Because no political player will be willing to accept any statutory response that worsens its lot relative to $J_1$, the actual

range over which the House, Senate, and President will be able to agree is somewhat smaller than *ΔHSP*:

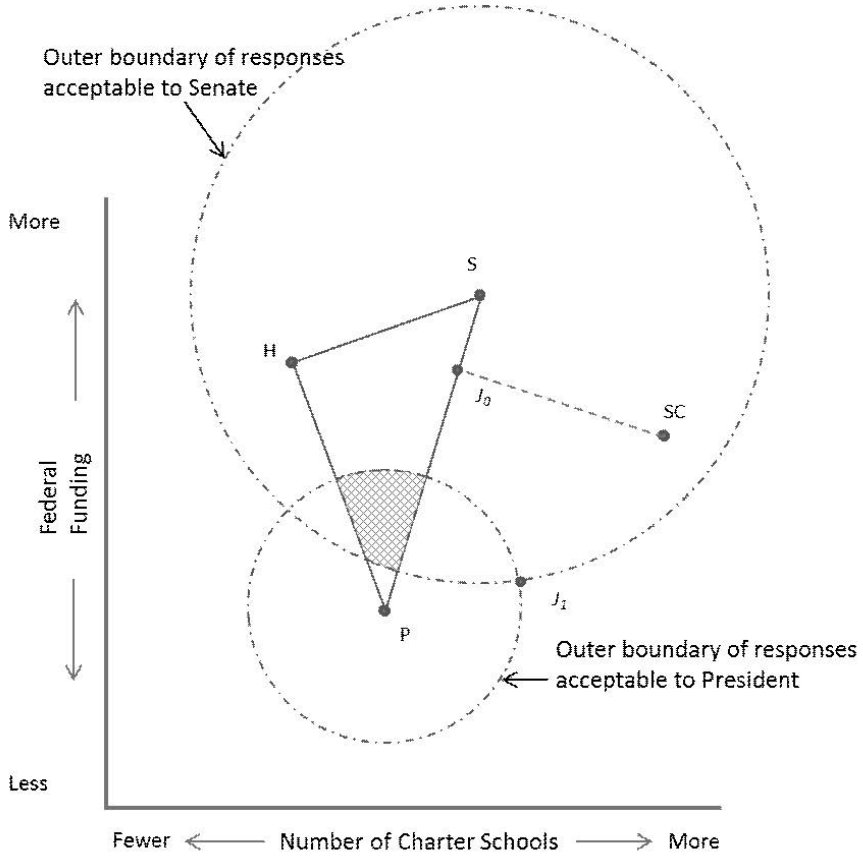


Figure 12: Baseline political response range for interpretation $J_1$

The crosshatched region in Figure 12 represents the range of possible outcomes of a response negotiation between the House, Senate, and President, given the Court's selection of point $J_1$.[96]

96. Recall that the Court's interpretation establishes a new status quo that may affect the range of possible statutory outcomes. *See supra* Part II.B.2. See Figures 11-12 and accompanying text for an explanation of how to identify the renegotiation region.

From the House's perspective, *any* point within $\Delta HSP$ is better than $J_1$, that is closer to $H$ than $J_1$, so the House's veto right will not constrain the political parties' bargaining. But there are points within $\Delta HSP$ that are worse for both the Senate and President, as they lie farther from their respective ideal points, than $J_1$. The crosshatched region is the portion of $\Delta HSP$ that would be better for all three political players than $J_1$; neither the House nor the Senate or President will veto any of the points within that region.

Once the range of possible agreements is identified, it remains to determine whether that range can or must produce a legislative override. Whether a given interpretation will elicit a statutory response is determined by (1) the relative bargaining power of the House, Senate, and President and (2) given that bargaining power, whether any player can improve its net position by incurring response costs. In the case of $J_1$, however, the precise bargaining power distribution is irrelevant to the analysis. The cost-benefit dynamics alone are such that a statutory response is a certainty.

Specifically, $J_1$ will elicit a response from the House even if the House fares as badly as possible in the ensuing renegotiation. The House's worst-case outcome when response bargaining with the President and Senate is the point within the bargaining range that is farthest away from the House's own ideal point $H$. Given the preference and cost distributions of the hypothetical, the House's worst-case outcome is located on the line segment connecting the senatorial and presidential ideal points, very close to the Senate's own ideal point, represented by point $H_{wc}$ in Figure 13 below:

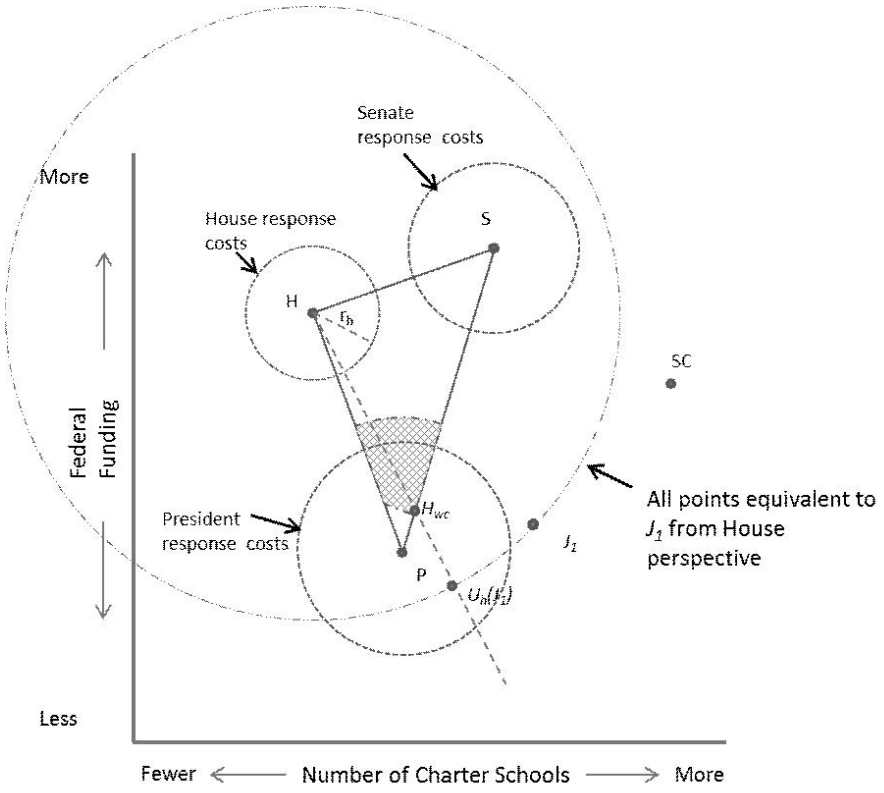


Figure 13: Interpretation $J_1$ untenable because House will respond; increase in utility from $U_h(J_1)$ to $H_{wc} > r_h$.

Because the political players' utility functions are linear, we can assess a player's change in utility from a particular policy change—in this case, moving from interpretation $J_1$ to the House's worst-case negotiated-response policy $H_{wc}$—by mapping that change on a line originating at the player's ideal point and running through the player's worst-case scenario.

The point $U_h(J_1)$ in Figure 13 is the same distance from $H$ as interpretation $J_1$; it thus has the same utility to the House as $J_1$. Point $U_h(J_1)$ is also on the same line as $H$ and $H_{wc}$; thus the distance between $U_h(J_1)$ and $H_{wc}$ represents the House's *improvement* in utility if the political parties negotiate a response to the Court's

interpretation, and the House fares as badly as possible in that negotiation. Note that the House's response costs, $r_h$, are lower (shorter) than the benefit of moving from $U_h(J_1)$ to $H_{wc}$. Because even a worst-case negotiation will improve the House's position by more than its own response costs, interpretation $J_1$ is not a viable option for a Court seeking a durable self-interested interpretation.

We could similarly ask whether the Senate's or President's worst-case response-negotiation scenarios would merit the expenditure of *their* response costs. Those analyses would be redundant, however, because only one political player needs to find it worthwhile to respond to render an interpretation untenable from the Court's perspective. Regardless, the specific dynamics of interpretation $J_1$ provide easy answers to these questions.

Recall that the crosshatched response range is substantially smaller than $\Delta HSP$, and that the arcs intersecting the triangle to form that region are a function of the President's and Senate's unwillingness to do worse than $J_1$ in a response negotiation. If either the Senate or the President was to do as badly as possible in the response negotiation, they would by definition find themselves at points utility equivalent to the new judicial status quo, $J_1$. Since either can have $J_1$ without incurring response costs by simply vetoing *any* response, they will not be willing to bid against themselves in that way. Thus, the House's costs and incentives alone dictate the outcome in this scenario.

*b. A Safe Interpretation*

The Court's second possible interpretation, $J_2$, represents the same slight improvement for the Court over $J_0$. Unlike the Court's first option, $J_2$ is safe from congressional override, regardless of the distribution of bargaining power among the House, Senate, and President. To understand why, we must turn our attention from worst-case scenarios to best-case scenarios. An interpretation is guaranteed to be safe for the Court if no player's *best* possible outcome improves its position by more than its response costs. Given the location of $J_2$ and the distribution of political players' preferences and costs, there exists only a tiny sliver of policy space —the miniscule crosshatched half lens created by the intersection

of $\Delta HSP$ and the Senate's and President's $J_2$-equivalent indifference curves in Figure 14—in which the political players may be able to locate a mutually superior statutory response:

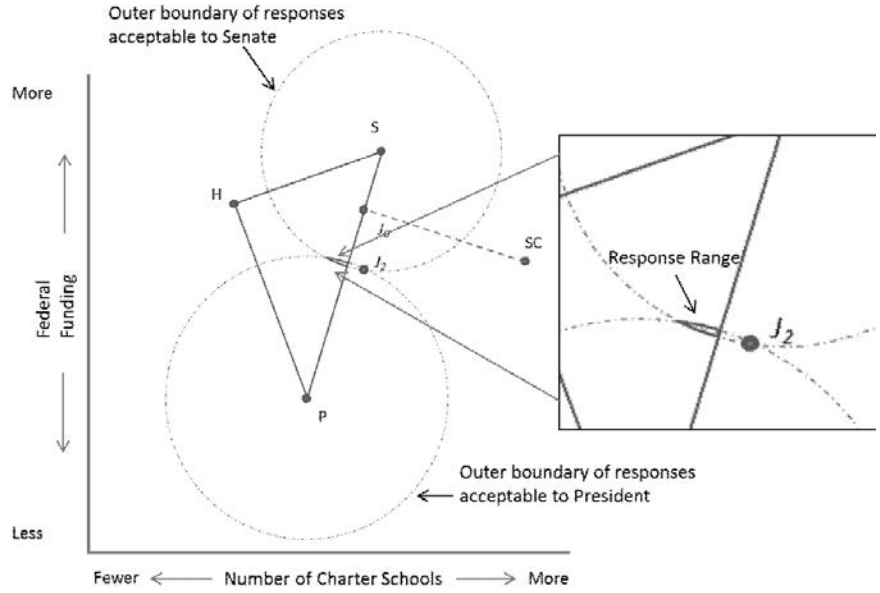


Figure 14: Baseline political response range for interpretation $J_2$

Given the tiny maximum improvements available to either the Senate or the President as a result of a response negotiation, neither of those players will be willing to incur its own more significant response costs, even if it was to do as well as possible in the response negotiation.

The House presents a closer call, but the answer is the same: even if the House has all the bargaining power and thus does as *well* as possible in the response negotiation, the improvement it would experience in moving from $J_2$ to its best-case outcome would not cover its costs:

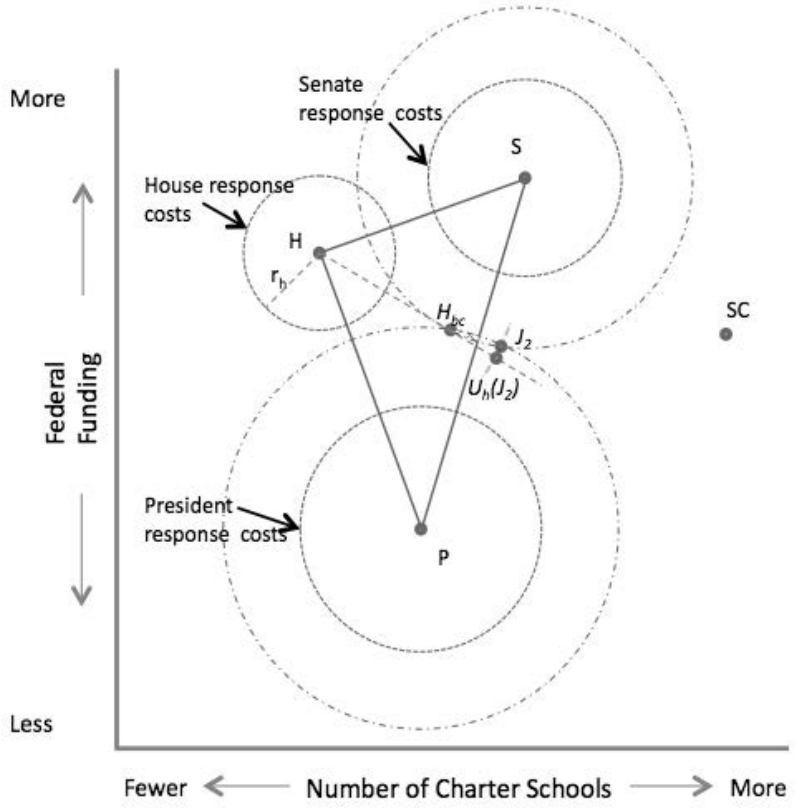


Figure 15: No political response to interpretation $J_2$; Increase in utility from $U_h(J_2)$ to $H_{bc} < r_h$.

As Figure 15 demonstrates, the House's utility improvement in moving from $J_2$ to its best-case negotiation outcome $H_{bc}$ is less than its response costs, $r_h$.[97] Thus, no political player has any incentive to incur response costs in connection with interpretation $J_2$; therefore, the Court's interpretation here would be safe from political override.

97. As in Figure 13, the point $U_h(J_2)$ represents the House's utility equivalent to point $J_2$, but it is along the same line as $H$ and $H_{bc}$ for ease of comparison.

*c. An Indeterminate Interpretation?*

In addition to areas within the Court's possible improvement zone that are either clearly safe or clearly off limits, there exist a number of possible interpretations in which the outcome may depend on the precise distribution of bargaining power and the negotiation dynamics among the political players. The Court's third potential interpretation, $J_3$, falls into that category.

*i. On Bargaining Power Alone*

This third possible interpretation lies relatively close to the second interpretation under consideration; accordingly, the story is again the same with respect to the Senate and President. Although the possible response range for interpretation $J_3$ is a bit larger than the miniscule response range available for interpretation $J_2$, the $J_3$ response range does not offer enough potential benefits to justify the Senate's or the President's expenditure of response costs.[98] This is true regardless of bargaining power distribution because the potential benefits to those players of moving from $J_3$ to any point within the crosshatched area are too low even under best-case conditions:

98. Similar to the analysis of interpretation $J_2$, the House's response calculus is irrelevant to the identification of the response range because the House would be willing to accept any response to interpretation $J_3$ that is mutually acceptable to the President and Senate; from the House's perspective, the vast majority of $\Delta HSP$ is preferable to $J_3$.

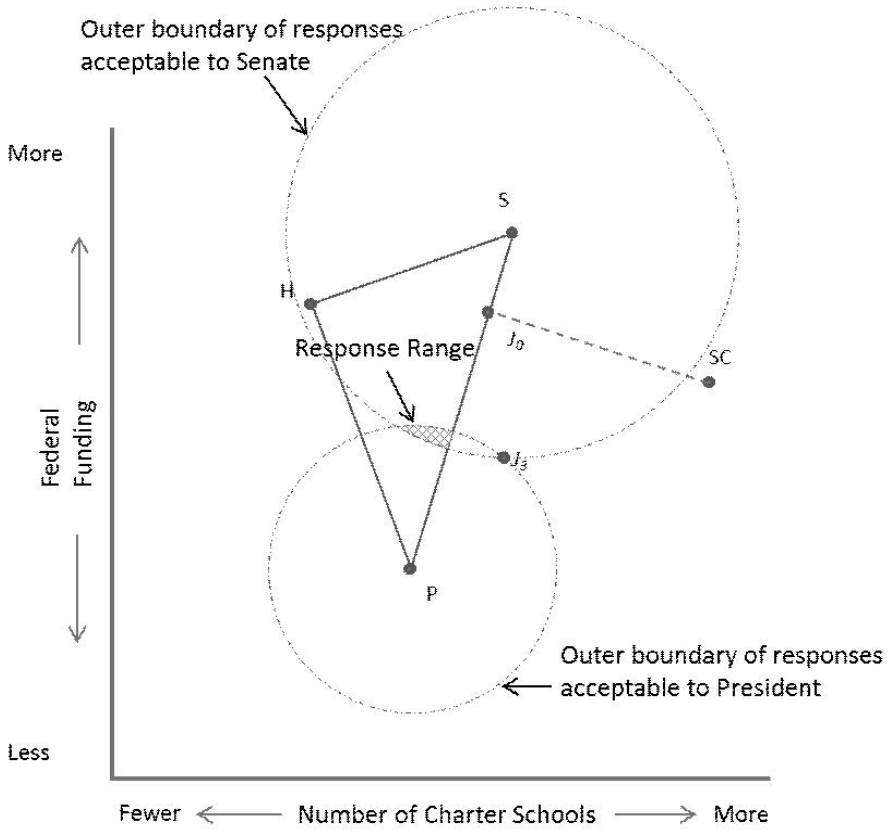


Figure 16: Baseline political response range for interpretation $J_3$

Whether the House will be willing to incur response costs is far less certain. Assume first that the House has *all* of the bargaining power, such that the political response negotiation yields the House's best-case policy, $H_{bc}$, the point closest to $H$ in the response range depicted in Figure 17:

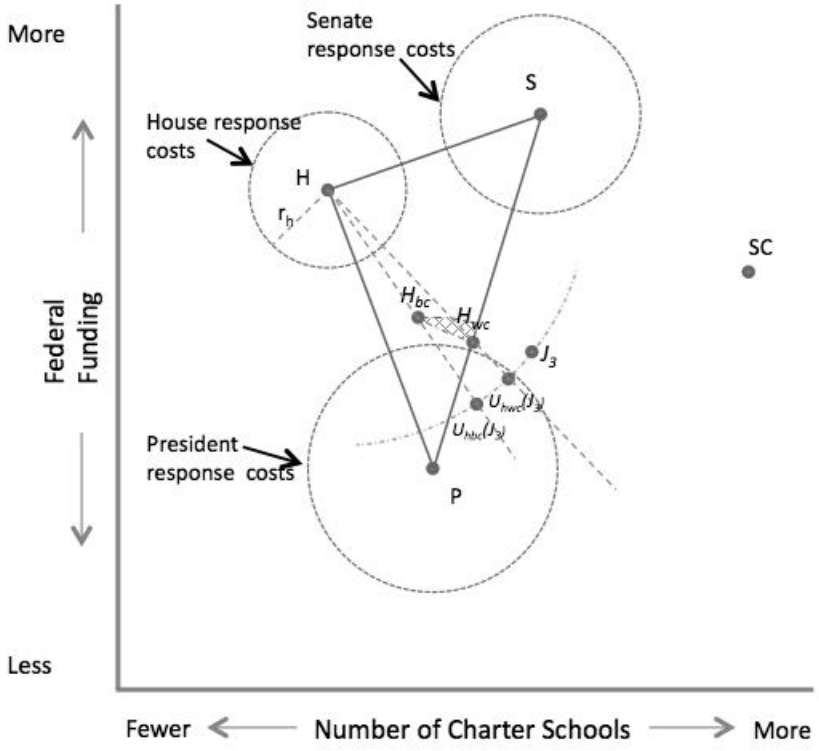


Figure 17: Political response uncertain for interpretation $J_3$; response dependent upon bargaining power of House and/or ability of political players to enter binding agreements *ex ante*

If the House obtains its best-case outcome, it will experience an increase in utility from $J_3$ to $H_{bc}$ that is greater than response costs, $r_h$. As before, this increase can be measured by identifying the $J_3$-equivalent point on the line connecting the House's ideal point $H$ and its best-case outcome, $L_{hbc}$. Because the distance between $U_{hbc}(J_3)$ and $H_{bc}$ is greater than $r_h$, the House will incur response costs if it holds all the cards during response negotiations.

If the Senate or President dominates the response negotiation, the House's course of action is less clear. In Figure 17, the point $H_{wc}$

represents the House's worst-case negotiation outcome—a state of affairs consistent with the President holding all of the bargaining power. If the dynamics of the response negotiation are such that the President can and will use that power to insist upon her best possible outcome, then the House will not find it worthwhile to incur response costs. The improvement from $U_{hwc}(J_3)$ to $H_{wc}$ would be insufficient to cover the House's costs. Thus, on the basis of these two possible bargaining power distributions alone, the viability of interpretation $J_3$ is indeterminate.

### *ii. The Problem of Political Promise Keeping Revisited*

Things do not necessarily get much clearer when it is assumed that the Court has complete and perfect information regarding the distribution of political bargaining power. Though knowledge that the House is in the driver's seat would allow the Court to anticipate a legislative response to interpretation $J_3$, knowledge that the President or Senate would dominate a response negotiation would be far less helpful.

This is because the House is in some ways the only relevant player in the single-iteration interaction initiated when the Court selects interpretation $J_3$. As acknowledged, neither the Senate nor the President will ever lift a finger to respond to $J_3$ independently, even though each may be willing to free ride on the House's efforts. The operative question therefore is whether the *House* will act. Even if the bargaining power distribution is such that the House is not *guaranteed* a net benefit from incurring response costs, we cannot say with certainty that the House will remain silent. As in the linear examples in Part I, there are policy positions within the possible response range that would provide a net benefit to the House after incurring response costs—if the House knows it can fix policy in one of those locations.[99]

The inquiry now is whether the House, Senate, and President can reach some compact whereby the House agrees to surrender some or almost all of its potential net benefit by drafting a response less House-preferable than its best-case scenario but acceptable to the Senate and President, in return for the Senate's and President's

99. *See supra* Figures 5-7.

agreement to accept that compromise. At first blush, this appears to be a win-win-win scenario for all three political players: (1) the response falls within the response range, or is better for all political players than $J_3$; (2) the House has expended less than its net benefits to obtain that response; and (3) the President and the Senate have gotten something for nothing.

At the same time, however, the sequential nature of the negotiation—the House first incurs response costs to draft a discretion-eliminating statute, then seeks approval from the Senate and President through the traditional Article I, Section 7 process[100]—again presents a potentially confounding sunk cost issue. Assume the House has incurred its response costs drafting detailed, discretion-eliminating legislation that fixes the level of federal charter schools funding precisely and explicitly limits the number of charter schools relative to interpretation $J_3$ by establishing strict and detailed eligibility requirements for federal tax incentives. Further assume the House's response accurately represents the terms of a prebrokered deal between the House, Senate, and President that reflects both (1) the bargaining power advantages of the Senate and President and (2) the House's need for its benefits to at least cover its costs.

In a single-iteration interaction, it would now be rational, but admittedly longitudinally destabilizing, for the Senate or President to refuse to accept the House's bill without a few additional changes—changes that would move federal charter schools policy further away from the House's break-even point. Having already incurred its response costs, the House would then be in a bit of a jam. If it refuses to budge, it risks a truly horrible outcome: policy may remain at $J_3$, and the House will have spent $r_h$ for no benefit whatsoever. And because its response costs are sunk, the House may ultimately choose to agree to the proposed modifications, even though it would not have incurred response costs in the first place had it known that would be the result. Accordingly, if the House anticipates betrayal by either the Senate or the President, it may choose not to expend response costs even though a mutually beneficial response exists.[101]

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100. U.S. CONST. art. 1, § 7.

101. The introduction of repeat-iteration analysis may help address this problem, as

As in the unidimensional context, the likelihood of betrayal almost certainly goes down in a repeat player environment in which reputational bonding and longstanding relationships between the political players would tend to decrease the incentives for that sort of behavior. At the same time, however, it is likely that the sunk-cost risk dynamic plays some role even in the more complicated real world; political actors who invest heavily by carrying the laboring oar on legislation almost certainly worry that they will lose some of their position in postdrafting negotiations.

## III. AMPLIFICATIONS AND APPLICATIONS

This Article is largely descriptive; for the most part, I have simply taken each political player's response costs as a given and then analyzed the results. Thus, a comprehensive treatment of the implications of the model lies well beyond the scope of the current project. Nonetheless, a brief closing discussion of several additional issues is warranted. In this Part, I briefly address (1) the general approach to identifying and categorizing the political players' response costs, (2) the extent to which the model and interest group theory interact, and (3) the model's potential application to several real-world contexts.

### *A. Categorizing Response Costs*

To this point, I have deliberately remained vague as to the details of the political players' response-cost functions. I avoid this discussion in part because a full analysis of the various components of a player's response costs lies beyond the scope of this Article; the primary point of this foundational discussion is to identify the potential *effects* of response costs without extensive analysis of their determinants.

For the primary purposes of this Article, it is therefore generally enough to know that (1) political players face response costs if they

players would be forced to consider the reputational consequences of their actions. For an introduction to the repeat player analysis, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). But within the context of a single-iteration game, the outcome associated with interpretation $J_3$ may well be unknowable.

wish to respond to an undesirable judicial interpretation, and (2) those response costs may, and likely will, differ from player to player.

At the same time, however, a brief discussion of several broad categories of response costs is helpful in several ways. First, it helps to make concrete some of the abstract cost-related difficulties associated with legislative overrides to objectionable judicial interpretations. In addition, meaningful discussion of the prescriptive implications of the model—something I mostly leave to others— is inherently dependent upon an understanding of the various components of the political players' response costs. Leading theories of statutory interpretation, for example, may well suggest different normative treatment of nominally objectionable judicial interpretations, depending upon the underlying sources of the players' response costs.

The following sketch of the basic categories of response costs will help inform those analyses. In general terms, I break the political players' intrinsic response-cost functions into three categories: (1) process costs, (2) search and specificity costs, and (3) opportunity costs.

*1. Process Costs*

The U.S. legislative process is, by design and evolution, both complex and difficult to navigate. The Constitution itself creates a deliberately cumbersome regulatory apparatus, and internal legislative procedures that have developed over time have typically only added to the complexity. Regardless of the normative desirability of such a system, few will deny that it is costly.[102]

The process costs attendant with legislation fall into two general subcategories. Some costs are essentially fixed; these costs are associated with almost every affirmative legislative action. If a unanimous Congress and President wanted to pass a statute declaring that "Old Glory Blue is one of the three colors on the American flag,"[103] it would still involve any number of costly steps

102. *See* HART & SACKS, *supra* note 17, at 164-65 (explaining the legislative process and its complications).

103. *See* U.S. GEN. SERVS. ADMIN., DDD-F-416F, FEDERAL SPECIFICATION: FLAG, NATIONAL, UNITED STATES OF AMERICA AND FLAG, UNION JACK § 3.5 (2005).

to move that bill through both chambers and to the President's desk for signature.[104] Relative to other categories of cost, these fixed costs of legislation likely do not provide much in the way of additional discretion to an interpreting court, but they are a real, if relatively minor, component of the political players' cost functions.

The other category of process costs is somewhat more interesting, and may more often be relevant in our analyses of judicial discretion. The legislative process is riddled with various gatekeeper nodes—committee and subcommittee chairs, in particular—that can raise the costs of legislation substantially. There will necessarily be an imperfect match between committee and subcommittee chair preferences and those of the full chambers they serve. Committee chairs acquire their posts on the basis of myriad factors; even at the subcommittee level, Congress is insufficiently differentiated to ensure that median or key member preferences as to any specific issue will necessarily be reflected in the chair herself.

For example, the Chair of the House Committee on Agriculture may generally prefer to limit farm subsidies on ideological grounds but may simultaneously express a strong preference for the ethanol subsidies on which her state's corn farmers rely. In such cases, the committee system itself may impose not only systemic costs but also costs specific to the issue under consideration. A legislative response to a liberal, pro-ethanol-subsidy judicial interpretation of an agriculture bill may enjoy broad support from both chambers and the President, and nonetheless face difficulty because the relevant committee chair's own idiosyncratic preferences get in the way.

*2. Search and Specificity Costs*

The model assumes that both the Court and the political players can identify their preferred outcomes with precision; each player's ideal point is a representation of that outcome in policy space terms. But being able to place a pin at a particular point on a preference map is not the same as effective codification of that preference. It is not enough to simply locate the nominal preferences of the political players. Nor is it sufficient to locate the nominal result

104. *See supra* notes 57-58 and accompanying text.

of a response negotiation between those players. Rather, we must acknowledge that the political players will find it costly both to research and then codify the response in a way that effectively constrains the Court.

For any expected legislative response, the costs of determining precisely how to give effect to that response may vary both from high to low and from player to player. Two key variables in part determine each player's search and specificity costs: (1) that player's background and expertise in the regulatory subject matter, and (2) the inherent linguistic complexity associated with giving an effective, discretion-eliminating voice to a legislative override.

A political player's search and specificity costs will be lower, all else equal, the greater that player's relevant background and expertise. A congressional committee with substantial experience in a particular area will generally find it less costly to research that area and to prepare legislation that accurately and effectively expresses legislative preferences. By contrast, a generalist White House staffer tasked with proposing blank-slate legislation in connection with an issue outside the traditional jurisdiction of executive branch agencies may face a remarkably steep—and thus costly—learning curve, simply to get up to speed on the issue.

Thus, it is likely that expertise-and-experience-driven search and specificity costs will vary substantially among and between the House, Senate, and President on an issue-by-issue basis. Whether by historical accident or for some other reason, expertise is not distributed equally among the political branches as to each issue. Rather, for true blank-slate legislation, we would generally expect to see (1) broadly lower costs for the legislative chambers relative to the executive branch because Congress serves as the primary drafter of most initial legislation and (2) some additional cost-lowering specialization among the three political players on a topic-by-topic basis. For legislation whose subject matter overlaps more with the traditional domain of an existing executive branch agency, we might expect the roles to be reversed.

The inherent linguistic complexity of expressing a given policy is another significant determinant of search and specificity costs. Different regulatory problems and different regulatory solutions may require quite different levels of linguistic specificity to effectively divest the courts of interpretive discretion. Return again to

the charter schools hypothetical. It may be quite costly for Congress to specify an intermediate position representing a preference for a moderately high number of charter schools and a moderately high level of federal funding. It may, for example, take substantial research to identify the precise language needed to give effect to the preferred policy, especially when that language is intended to drive the primary behavior of third parties.

For example, assume that Congress wishes to increase the number of charter schools by 3000 over the next five years. Assuming that Congress in fact possesses the tools necessary to encourage the desired amount of growth, it still may be quite costly for Congress to figure out what level of tax incentives or single-institution funding cap will yield the correct result. Moreover, the requisite statutory language itself may be quite detailed and complex.

By contrast, it may be much less costly for the political players to give voice to a more extreme preference. A political apparatus broadly antagonistic to charter schools along both dimensions may be able to give effective expression to its collective preferences with considerably less research and with concomitantly less investment in legislative drafting.

More generally, we would expect complexity-driven search and specificity costs to increase in direct proportion to both the inherent regulatory complexity of the underlying problem and the inherent complexity of the political players' negotiated response to the objectionable interpretation. Thus, the classic debate over rules and standards rears its head here.[105] To the extent the existing literature on rules and standards discusses promulgation costs at all, it typically adopts the conventional wisdom that discretion-granting

105. *See, e.g.*, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Lawrence B. Solum, *Legal Theory Lexicon 026: Rules, Standards, and Principles*, LEGAL THEORY LEXICON (Apr. 15, 2012), http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_3.html; *see also* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 15-21 (Illini Books ed. 1971) (explaining why most court decisions are based on judicial discretion rather than rules); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISON-MAKING IN THE LAW AND IN LIFE (1991) (analyzing rules as probalistic generalizations); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974) (examining the "conditions under which greater specificity or greater generality is the efficient choice" in the legal process based on a cost-benefit analysis).

standards are less costly to enact than deterministic rules because they require less detailed research and negotiation.[106] This is true, as far as it goes. But recall that the objective in our situation is to draft *discretion-eliminating* legislation in response to an objectionable judicial interpretation. Thus, the first rules-versus-standards question here is whether, *agency costs aside*, the regulatory problem in question is objectively better suited to rule regulation or standard regulation. The second, related question is whether the political players' response preference is sufficiently extreme to mitigate or eliminate the difficulties associated with a discretion-constraining statutory response.

Using somewhat shopworn examples to illustrate the point, consider two hypothetical federal statutes, one prohibiting driving at an "unsafe speed" on interstate highways, and one prohibiting "fraud in the marketing or sale of federally registered securities." Now assume the Supreme Court has recently issued opinions interpreting each statute. In the first, the Court declares that 100 miles-per-hour is presumptively a reasonable speed for interstate highway travel. In the second, the Court holds that the fraud statute does not apply to sales to "sophisticated investors" like the high-income physician plaintiffs in the case before the Court.

The political players' search- and specificity-driven response costs will vary for each scenario, both as a function of the underlying problem and as a function of the negotiated legislative response. In the "unsafe speed" example, problem-related search and specificity costs would likely be quite low. Even accounting for error costs, it should be relatively inexpensive for the political players to identify one or more discretion-eliminating maximum speeds for interstate highway drivers. Those costs will also rise or fall depending upon the precise preferences of the political players. If the House, Senate, and President all place high value on highway safety and low value on economic activity, they may be comfortable passing a more restrictive, highly deterministic statute: "It shall be unlawful for motor vehicles to travel on interstate highways at any speed greater than 35 miles-per-hour."

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106. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557 (1992); *see also* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

If the political players have intermediate views, or as here, if the two preference dimensions stand in potential tension with one another, it may be somewhat more costly to pass a discretion-eliminating statute that effectively gives voice to political preferences. For example, the statute might need to differentiate between types of traffic, times of day, weather conditions, and location of roadway, for example. It might also require a much higher investment in information to identify the optimal linguistic expression of political preference along broadly defined dimensions like "highway safety" and "economic activity," including, for example, extensive empirical research on both the commercial and safety implications of various potential speed limit regimes.

In the securities fraud context, the inherent search and specificity costs associated with the problem are likely somewhat higher than for the speed limit example. In general terms, whether a party has committed fraud is more typically determined on a case-by-case basis. Even with respect to identification of covered victims, the reliance requirement of the common law prima facie case suggests a certain ambiguity for which judicial discretion might be particularly appealing in a world without agency costs. Compared to the speed limit example, we might expect the baseline search and specificity costs associated with correcting an objectionable judicial interpretation of the fraud statute to be somewhat higher.

But as with the speed limit example, the extremity of the political players' views is also highly relevant. In worlds in which the political players wish to protect *all* or *no* victims, regardless of their level of sophistication, the statutory fix will be less costly than in a world in which political preferences are more nuanced.

*3. Opportunity Costs*

The House, Senate, and President also face opportunity costs when they consider responding to an objectionable Supreme Court interpretation. The time and resources the political players devote to a specific legislative override cannot be used for other matters; it is thus appropriate that our response-cost functions account for the opportunities foregone by each political actor if it chooses to respond to the Court's implicit provocation.

It is admittedly a bit difficult to identify precisely where search and specificity costs end and opportunity costs begin—yet another reason why I avoid detailed definition of response-cost functions. For example, there is at least some evidence that the political branches remain functionally unaware of some Supreme Court statutory interpretation opinions, or at least choose not to invest heavily in determining whether the opinions merit a response.[107] Moreover, a political player's opportunity costs likely will correlate somewhat with its search and specificity costs, insofar as those costs inform the player's internal calculus regarding what it must give up to respond to the Court.

At the same time, however, opportunity costs deserve separate treatment, because the concept captures political preference intensity relative to other issues not up for consideration, a variable wholly missing from earlier attempts to model judicial discretion. In general terms, opportunity costs should be inversely correlated with intensity of preference. That is, the more intensely a political actor cares about a particular issue, the lower its opportunity costs of responding. The less it cares, the higher those costs.

As with search and specificity costs, opportunity costs will also vary both by issue and player. Returning to the securities fraud hypothetical above, it is plausible to imagine a scenario in which the President, facing significant foreign policy challenges, and a Senate, concerned with overhauling regulation of the financial sector, will face relatively higher opportunity costs than a House recently elected largely on the back of popular perception that corporations engage in systemic fraud. All three players might have similar *nominal* preferences, well to the political left of the Court's, but their individual response costs will also vary as a function of their remaining agenda, et cetera.

The foregoing discussion deliberately takes a snapshot approach consistent with the single-interaction focus of the model. I therefore bracket for the time being the challenges associated with quantifying a political player's response costs in a world in which the player cares simultaneously about contemporaneously desirable political outcomes and about being able to credibly promise important

107. *See* JELLUM & HRICIK, *supra* note 9, at 253-88.

constituencies durable legislative bargains.[108] In theory, I could handle this problem in several ways, but the analysis may become quite complicated, because it might require adjustment of either the player's ideal point or of its response costs as a function of the location of the judicial interpretation itself. This would make both the game theory and the underlying mathematics substantially more difficult without significant additional descriptive payoff.

### *B. The Influence of Interest Groups*

To this point, I have assumed that the political players' response costs are entirely internal. But both the lessons of practical experience and the insights of public choice theory teach that interest groups may be able to influence political response costs by placing a thumb on one side of the scale or the other.[109]

The conventional interest group theory account generally analyzes campaign contributions and other electorally focused interest group conduct in an attempt to understand the influence wielded by interest groups in the legislative process.[110] But any discussion of this type of interest group involvement in the statutory interpretation game would effectively import repeat player concerns through the back door, because a political player affected by interest group pressure of that sort would necessarily be looking ahead to the longitudinal costs or benefits of legislative action or inaction.

I therefore focus instead on the ways in which interest groups might directly affect the political response costs associated with our standard single-iteration game. In general, sufficiently motivated interest groups will be able to either raise or lower the response costs associated with a potential legislative override. But we would not expect their ability to raise or lower costs to be distributed symmetrically; rather, it will typically be the case that interest groups can lower political response costs more effectively than they can raise them.

An interest group focused on obtaining a legislative override of an objectionable Court interpretation can lower political response costs

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108. *See, e.g.*, Landes & Posner, *supra* note 23, at 877-78 (discussing legislative bargains).

109. FARBER & FRICKEY, *supra* note 12, at 12-37.

110. *See, e.g.*, Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35-36 (1991).

by subsidizing the political players' search and specificity costs. As an intensely interested subject-matter expert, the interest group has both the incentive and the ability to invest cost-effectively in the promulgation of legislation. It is therefore hardly surprising that interest groups often present "plug and play" legislation for congressional consideration, complete with research and other supporting materials upon which a favorably disposed House or Senate can rely.[111] To the extent the interest groups' presentation of research, background material, or draft legislation shortcut the political players' consideration of a given issue, it lowers the political players' response costs.

Interest groups can also potentially lower political response costs by raising the salience of issues that would otherwise remain low on the political branches' to-do lists. The very act of lobbying lowers political players' response costs by lowering the search costs associated with becoming aware of an issue. In addition, to the extent "the squeaky wheel gets the grease," lobbying activity can lower a player's opportunity costs by moving the issue up in the queue relative to other issues.

An interest group *opposed* to a congressional override has a somewhat more limited menu of options. It can, of course, provide its own competing research and other supporting materials to those members of the political body likely to be receptive to its views; they may also lobby the relevant legislators and staffers heavily in an attempt to stop or slow the legislative process. But the dynamics of the committee-level legislative process are such that most of any interest group's cost-increasing weapons are likely to be somewhat less effective than its cost-decreasing tools.

111. *See id.*

### *C. Applying the Model to Three Real-World Contexts*

#### *1. Federal Civil Pleading Standards After* Ashcroft v. Iqbal

##### *a. Case Background*

In May 2009, the Supreme Court cemented and arguably extended a particularly conservative interpretation of the federal civil pleading standard with its five-to-four decision in *Ashcroft v. Iqbal*.[112]

Before *Iqbal* and its 2007 companion case *Bell Atlantic Corp. v. Twombly*, the Court had routinely interpreted the pleading standard in Federal Rule of Civil Procedure 8(a)(2) remarkably liberally. This rule, intended as the centerpiece of the entire Federal Rules project,[113] requires only that a plaintiff provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[114] The paradigm example of the Court's liberal interpretation of the rule appeared in *Conley v. Gibson*, which held that a plaintiff's claim should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[115]

In *Twombly*, the Court rejected the classic *Conley* formulation, holding that in a complex antitrust case, Conley's "no set of facts" language had "earned its retirement."[116] Instead, the Court held that the class action plaintiffs in *Twombly* could survive a motion to dismiss only if their factual allegations made the existence of a prohibited antitrust conspiracy "plausible."[117] Because the Court thought the plaintiffs' allegations equally consistent with both the

112. 556 U.S. 662 (2009).

113. *See, e.g.*, Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1749 (1998); *see also* Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 272 (1942). Clark did note, however, that the complexity and technicality of common law pleading was only part of the story. *Id.* at 274-75. In Clark's retelling, the common law pleading system remained simple and direct for many categories of claims but fell into disrepute due to lawyers' pleading practices in other case types. *See id.* at 275.

114. FED. R. CIV. P. 8(a)(2).

115. 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2009).

116. *Twombly*, 550 U.S. at 562-63.

117. *Id.* at 570.

existence and the nonexistence of a conspiracy, it dismissed the case.[118]

For a variety of reasons, many commentators and courts initially assumed that *Twombly*'s application was limited to the antitrust context.[119] This perception, coupled with the fact that the federal government was divided from 2007-2009,[120] apparently led Congress to take little interest in the case.[121]

So the Court doubled down in *Iqbal*. In that case, the Court clearly stated that the "plausibility" standard announced in *Twombly* applied to *all* federal claims, including Mr. Iqbal's allegation that then-Attorney General John Ashcroft and then-FBI Director Robert Mueller had been personally involved in a conspiracy to deny various constitutional and statutory rights to Muslim men detained in connection with terrorism investigations.[122] In the Court's view, Iqbal alleged no facts tending to make the existence of a conspiracy involving Ashcroft and Mueller plausible.[123] Thus, the Court remanded Iqbal's case to the court of appeals with instructions to determine whether Iqbal should be given further opportunity to amend his deficient complaint.[124]

By the time the Court decided *Iqbal* in May 2009, the political landscape had vastly changed. President Obama took office in January 2009 with substantial Democratic working majorities in both chambers of Congress.[125] Riding Obama's electoral coattails, the Senate moved from an even split in the 110th Congress to a sixteen-seat majority in the 111th, and House Democrats increased

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118. *Id.* at 564-65, 570.

119. *See, e.g.*, Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to a Federal Pleading Practice*, 243 F.R.D. 604, 632 (2006).

120. Democrats effectively controlled both houses of the 110th Congress while George W. Bush was president. *See* MILDRED AMER, CONG. RESEARCH SERV., RS22555, MEMBERSHIP OF THE 110TH CONGRESS: A PROFILE 2 (2008), *available at* http://www.senate.gov/reference/resources/pdf/RS22555.pdf.

121. *Cf. supra* note 9 and accompanying text (discussing what inferences may be made from congressional inaction).

122. Ashcroft v. Iqbal, 556 U.S. 662, 666, 678 (2009).

123. *Id.* at 680.

124. *Id.* at 687.

125. *See supra* note 3 and accompanying text.

their margin from thirty-one to seventy-nine seats as a result of the 2008 elections.[126]

Moreover, Democrats in both chambers were obviously aware of the *Iqbal* decision, which some publicly decried as "limit[ing] Americans' access to courts."[127] Senate Democrats held formal hearings in December 2009, and members of Congress proposed multiple bills aimed at "fixing" the *Iqbal* problem.[128] Ultimately, however, these bills went nowhere; when Republicans regained control of the House in January 2011,[129] they effectively ended discussion of a statutory response to *Iqbal* until the 2012 election cycle at the earliest.

*b. Applying the Model*

The model I introduced in Parts I and II provides a plausible explanation for congressional silence in response to *Iqbal*. I acknowledge yet again that it is likely impossible to identify political preferences precisely, and that it is similarly difficult to quantify political response costs with complete accuracy. That said, what is known about both political preferences and costs is more than suggestive.

If we array the relevant players' pleading standard preferences along a single-dimension continuum from "plaintiff friendly" on the left to "defense friendly" on the right, it seems clear that all three political players' ideal points in 2009 and 2010 lay well to the left of the Supreme Court's. And if we take a two-dimensional approach, mapping "plaintiff-friendly-to-defense-friendly" preferences on one axis, and lower-to-higher judicial workload on the other, for example, the story is much the same.[130] In a two-dimensional

126. *Party Divisions of the House of Representatives, 1789-Present*, U.S. HOUSE OF REPRESENTATIVES, http://artandhistory.house.gov/house_history/partyDiv.aspx (last visited Feb. 14, 2013); *Party Division in the Senate, 1789-Present*, U.S. SENATE, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Feb. 14, 2013).

127. *See, e.g.*, *Has the Supreme Court Limited Americans' Access to Courts?: Hearing on S. 1504 Before the S. Comm. on the Judiciary*, 111th Cong. 172 (2009) (statement of Sen. Russell D. Feingold).

128. *See infra* notes 133-34 and accompanying text.

129. Carl Hulse, *Republicans Retake House, Ousting Old and New Alike*, N.Y. TIMES, Nov. 3, 2010, at P1.

130. If I were to depict the *Iqbal* problem graphically, I would probably select a one-dimensional approach, because most other plausible policy dimensions would likely be

analysis, we would expect the Supreme Court to occupy the corner opposite of the political players' preferences; it is quite unlikely that the Court's absolute preferences fell within the political players' Pareto triangle.

In addition, the response costs associated with a legislative response to *Iqbal* were almost certainly sufficiently high to give the Court interpretive discretion outside of the Pareto space. There is admittedly little reason to believe that process costs were particularly high; neither House Judiciary Committee Chair John Conyers[131] nor Senate Judiciary Committee Chair Patrick Leahy[132] was likely to stand in the way of a response; the same is true for the relevant subcommittee chairs. But search and specificity costs and opportunity costs are another matter entirely.

Although members of Congress did introduce several bills as proposed statutory fixes for *Iqbal*, none of the proposed statutes was particularly likely to effectively cabin Court discretion. For the most part, the proposed bills fell into one of two categories: "*Conley*" or "*Conley*-plus." For example, the leading Senate bill attempted to explicitly codify *Conley*:

> Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957).[133]

By contrast, the leading House version would have codified a *Conley*-plus approach by expressly readopting the "no set of facts"

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relatively unimportant to the political branches. Thus, the equal value assumption would be particularly problematic.

131. *Biography of John Conyers, Jr.*, U.S. HOUSE OF REPRESENTATIVES, http://conyers.house.gov/index.cfm/biography (last visited Feb. 14, 2013). Congressman Conyers was a cosponsor of the leading House effort to override *Iqbal*. Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

132. *The Committee Chairman*, U.S. SENATE COMMITTEE ON THE JUDICIARY, http://www.judiciary.senate.gov/about/chairman.cfm (last visited Feb. 14, 2013) (listing Senator Patrick Leahy as the chair of the Senate Judiciary Committee).

133. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009).

standard from *Conley*, while explicitly rejecting the relevance of judicially determined "plausibility":

> A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.[134]

But neither the codification of *Conley* nor the *Conley*-plus approach really solves the problem. Pleading requirements effectively must be governed by a standard rather than a rule. So long as congressional preferences lie somewhere between the two politically untenable extremes of "all cases go to discovery" and "no cases go to discovery," the only realistic way for Congress to express those preferences is in the form of a standard delegating substantial authority to the Supreme Court and inferior courts to decide on a case-by-case basis.

In fact, pleading law is necessarily something of a metastandard. Courts are generally called upon to exercise mandatory jurisdiction over myriad forms of civil disputes, including disputes in which liability is governed by rules, by standards, and everything in between. Given the functionally infinite variation in fact patterns and governing substantive law, crafting a fully determined rule codifying any ideal point in the great middle between "all cases" and "no cases" would be breathtakingly expensive and likely functionally impossible. Assuming that the congressional ideal point does in fact lie somewhere in that great middle, courts will necessarily have to exercise discretion on a case-by-case basis to determine whether a given claim passes muster. In terms of the model, this means that search and specificity response costs for the pleading problem would be extremely high.

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134. H.R. 4115.

Another proposed statutory response, this one introduced by Senator Specter on the eve of his departure from the Senate, demonstrates the challenge.[135] In an attempt to capture the benefits of the Court's pre-*Twombly* jurisprudence without providing excess discretion, the Specter bill would have imposed a *date* limitation on the Court:

> Except as expressly provided by an Act of Congress enacted before, on, or after the date of enactment of this Act ... or by an amendment to the Federal Rules of Civil Procedure effective on or after that date, the law governing a dismissal, striking, or judgment described under subsection (b) shall be in accordance with the Federal Rules of Civil Procedure *as interpreted by the Supreme Court of the United States in decisions issued before May 20, 2007*.[136]

With this bill, Senator Specter implicitly recognized that congressional preferences regarding pleading requirements were extraordinarily difficult to express in detailed, discretion-eliminating terms. Instead, Specter attempted to import a standard by embracing all pre-2007 Supreme Court pleading cases statutorily.

But this approach too would fall well short of eliminating the Court's discretion. The Supreme Court is extraordinarily good at distinguishing its own precedent. Though Specter's final attempt would have negated the portion of *Twombly* in which the Court "retired" the "no set of facts" language from *Conley*,[137] neither the 2010 Specter bill nor any of the other proposed statutory fixes would have prevented the Court from reaching functionally the same result by other means. Thus, even though Congress could more or less identify what it wanted with respect to civil pleading standards, it found it extremely difficult, and concomitantly costly, to put those preferences into the sort of detailed language that would have simultaneously eliminated judicial discretion while preserving the actual political preference.

Finally, the political players also faced high opportunity costs in connection with the pleading debate. During 2009 and 2010,

135. Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong. (2010).
136. *Id.* § 3(a) (emphasis added).
137. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562-63 (2007).

Congress and the President were focused on a variety of higher profile issues, including a faltering economy, post-crisis financial sector regulation reform, and an enormously important and contentious debate over national healthcare policy.[138] Though the pleading standard controversy was substantially more salient than most civil procedure related issues, it still fell far short of being a top priority for any of the political players.

Given this distribution of preferences and costs, it is at least plausible that the Supreme Court was able to decide *Iqbal* without congressional response at least in part because the costs associated with that response were too high.

### *2. Bailing Out of the Voting Rights Act After* NAMUDNO v. Holder

#### *a. Case Background*

When the Court interprets statutes, it is generally supposed to give expression to "congressional intent," however divined.[139] But the Court enjoys its own area of interpretive primacy as well: constitutional law. As a practical matter, finding a statute unconstitutional is effectively a trump card. In terms of the model, a Supreme Court finding of unconstitutionality would dramatically increase political response costs, in most cases well beyond what the political players would be willing to incur.[140]

But the self-interested Court might use its constitutional authority in another way as well: it may obtain additional protection for an unpopular *statutory* interpretation by threatening a *constitu-*

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138. *See The Road We've Traveled*, YOUTUBE (Mar. 15, 2012), http://www.youtube.com/watch?v=2POembdArVo/ (documentary on President Obama's first term).

139. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984).

140. Consider *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). The Court's holding that certain provisions of a campaign finance statute violated the First Amendment led to numerous proposed statutory responses aimed at curbing the perceived evils of the holding. *Id.* at 889. As of this writing, none have gained passage. *See* DISCLOSE Act, H.R. 5175, 111th Cong. (2010); DISCLOSE Act, S. 3628, 111th Cong. (2010). As a general rule, the presence of the constitutional issue generally means that the available benefits of a partial solution do not exceed the costs of enacting that solution.

*tional* response. This is a plausible account of the Court's actions in *NAMUDNO*.[141]

Among other things, the Voting Rights Act attempts to remedy voting-related racial discrimination in geographic regions historically associated with discriminatory practices.[142] Section 5 of the Act requires political subdivisions within those areas to seek "preclearance" from a federal three-judge panel before making any changes to their voting procedures.[143] This preclearance requirement is subject to a limited "bailout" exception allowing certain government entities to bail out of the requirement if they satisfy certain stringent conditions.[144]

Northwest Austin Municipal Utility District Number One (NAMUDNO) is a small government subdivision responsible for delivering certain government services to residents of Travis County, Texas.[145] In 2006, NAMUDNO filed suit in the Federal District Court for the District of Columbia seeking a declaratory judgment stating that, because it had no history of voting discrimination, it should be allowed to bail out of the preclearance requirement and change its election procedures without judicial preclearance.[146] In the alternative, NAMUDNO alleged that section 5 of the Voting Rights Act was unconstitutional because it exceeded Congress's enforcement power under the Fifteenth Amendment.[147]

The statutorily mandated three-judge panel unanimously rejected both claims.[148] It first held that NAMUDNO was ineligible to seek a bailout because the statute limits bailout eligibility to states and political subdivisions that actually register voters, which NAMUDNO does not do.[149] It then upheld the constitutionality of section 5 of the Voting Rights Act, concluding that the preclearance requirements remained rational in light of an extensive record of continued race-related voting rights violations in covered states.[150]

141. 557 U.S. 193 (2009).
142. *See* 42 U.S.C. §§ 1973b(a), 1973c(a) (2006).
143. *Id.* § 1973c(a).
144. *Id.* §§ 1973b(a), 1973c(a).
145. *NAMUDNO*, 557 U.S. at 200.
146. *Id.* at 200-01.
147. *Id.*
148. *Id.* at 201.
149. *Id.*
150. *Id.*

The Supreme Court reversed.[151] In an essentially unanimous opinion,[152] the Supreme Court rejected the district court's statutory interpretation, holding instead that NAMUDNO *was* eligible to seek a bailout under the Voting Rights Act.[153] Citing its customary avoidance doctrine, the eight-member majority expressly refused to reach the constitutional issue, instead basing its disposition of the case entirely upon the statutory interpretation claim.[154]

But the Court did not leave the constitutional backdrop wholly undisturbed. Rather, Chief Justice Roberts's majority opinion explored in some detail both the purported improvements in voting rights since the Act's initial passage[155] and the federalism burdens imposed by the preclearance requirement.[156] Moreover, Roberts's opinion issued what might be interpreted as shots across the political bow, noting that "the Act imposes current burdens and must be justified by current needs," and that "[w]hether conditions continue to justify such legislation is a difficult constitutional question [that the Court does] not answer today."[157]

*b. Applying the Model*

Some commentators have interpreted *NAMUDNO* as a warning to Congress to update section 5 of the Voting Rights Act to reflect modern discrimination concerns.[158] This may well be the case, but *NAMUDNO*'s constitutional threats may have another effect: they

151. *Id.* at 211.

152. Justice Thomas concurred in the judgment in part and dissented in part; he would have reached the constitutional issue and would have found section 5 of the Voting Rights Act unconstitutional in light of the decrease in racially motivated voting discrimination since the Act's original passage. *Id.* at 212-29 (Thomas, J., concurring in the judgment in part and dissenting in part).

153. *Id.* at 211 (majority opinion).

154. *Id.* at 205-06.

155. *Id.* at 202-03.

156. *E.g.*, *id.* at 202 ("These federalism costs have caused Members of this Court to express serious misgivings about the constitutionality of § 5.").

157. *Id.* at 203, 211.

158. *See, e.g.*, Richard L. Pildes, *Voting Rights: The Next Generation*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 17, 25 (Guy-Uriel E. Charles et al. eds., 2011) ("Given this, the *NAMUDNO* opinion may be seen as a warning to Congress: Either modernize Section 5 or risk seeing it struck down in a future decision.").

may raise the political costs of responding to the Court's questionable statutory interpretation opinion past the point of feasibility.

The Court decided *NAMUDNO* on June 22, 2009, just a few weeks after *Iqbal*.[159] The same Democrat-dominated political apparatus that confronted *Iqbal* was thus faced with deciding whether to pass corrective legislation in response to *NAMUDNO* as well.[160]

There is reason to believe that the House, Senate, and President all would have preferred an interpretation that excluded NAMUDNO from bailout eligibility. First, numerous Democratic members of Congress took the rather unusual step of filing an amicus brief in support of the federal government's position that preclearance was necessary.[161] Second, Democratic lawmakers have long been more reluctant than their Republican counterparts to ease regulations designed to remedy racial discrimination in voting.[162] Racial minorities are critically important electoral constituencies to many Democratic politicians,[163] and it is plausible to assume that these officials would prefer that exceptions to the Voting Rights Act remain extremely limited.

But the response cost story looks quite different from the *Iqbal* example. With respect to liberal Voting Rights Act legislation from January 2009 through January 2011, we would again expect process costs to be low; no reason exists to believe that any Democratic legislator would use her agenda-setting power to delay an override. And this time, search and specificity costs were also low. It would have been remarkably simple for Congress to clarify that political subdivisions like NAMUDNO were not eligible to seek a bailout from the Act's preclearance requirements—several lines of text would have solved the problem.

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159. *NAMUDNO*, 557 U.S. at 193; *see also* Ashcroft v. Iqbal, 556 U.S. 662, 662 (2009) (decided May 18, 2009).

160. *See supra* note 3 and accompanying text.

161. *See* Brief of Barbara Lee et al. as Amici Curiae in Support of Appellees, *NAMUDNO*, 557 U.S. 193 (No. 08-322), 2009 WL 871819; Brief of Rep. John Conyers, Jr. et al., *supra* note 8.

162. *See, e.g.*, J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 670-71 (2008).

163. *See, e.g.*, Zoltan Hajnal & Taeku Lee, *The Untold Future of American Politics*, CAMPAIGN STOPS (June 4, 2012, 10:05 PM), http://campaignstops.blogs.nytimes.com/2012/06/04/the-untold-future-of-american-politics/.

Similarly, opportunity costs were almost certainly lower as to *NAMUDNO* than as to *Iqbal*. Voting rights are an important and highly salient issue to Democratic lawmakers, and they should have been all the more so in light of the then-recent election of the nation's first African American President.[164]

What, then, explains political silence after *NAMUDNO*? Perhaps the constitutional portion of the Court's opinion substantially raised the political players' response costs. By questioning the continued constitutional viability of section 5, the Court strongly implied that the current regime, including a broad reading of government subdivision bailout rights, lies at the constitutional boundary. Thus, a political player contemplating a response to the interpretation must simultaneously consider an additional category of costs: those associated with the likelihood that the Court will declare the entire preclearance scheme unconstitutional if the line is crossed.

Therefore, the Supreme Court's well-accepted primacy in constitutional matters arguably gave it the ability to protect an interpretation of the Voting Rights Act with which the President and a substantial majority of Congress likely disagreed; by threatening a constitutional response, the Court raised political response costs in an otherwise low-cost environment.

### *3. A Low-Cost Counterexample: The Lilly Ledbetter Override*

A clearer picture of the model's implications emerges in cases in which the political players ultimately *do* successfully override a Supreme Court interpretation.[165] The Court's 2007 opinion in *Ledbetter v. Goodyear Tire & Rubber Co.* offers a particularly useful

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164. *See* Adam Liptak, *Review of Voting Rights Act Presents a Test of History v. Progress*, N.Y. TIMES, Apr. 28, 2009, at A16.

165. The fact that Congress occasionally overrides the Court's statutory interpretations does challenge some of the model's assumptions. In particular, a successful, relatively contemporaneous override may be inconsistent with some combination of the following assumptions: perfect/complete information for the Court, the Court's inherent risk aversity, and the Court's assumed desire to maximize its own preferences in a single-iteration interaction. But my primary purpose in elucidating the model is to demonstrate the maximum interpretive space available to the Court under ideal conditions. I do not claim that my stylized model describes the real world with complete accuracy; rather, I include those assumptions to help define the battleground.

example of the dynamics that do *not* significantly impede a political response.[166]

*a. Case Background*

Just before Lilly Ledbetter retired from her twenty-year career as a Goodyear plant supervisor in 1998, she initiated proceedings with the Equal Employment Opportunity Commission (EEOC), claiming illegal sex-based discrimination during a series of performance evaluations dating back many years.[167] Specifically, Ledbetter claimed that the significant *current* disparity in pay between herself and her male counterparts was the cumulative result of these discriminatory evaluations.[168] A jury awarded Ledbetter back pay and damages.[169] The Eleventh Circuit, however, erased Ledbetter's trial victory, holding that the relevant discrete acts of discrimination—her negative performance reviews—occurred outside the 180-day limitations period imposed by Title VII.[170]

Before the Supreme Court, Ledbetter argued that every paycheck reflecting the past discrimination constituted a separate actionable violation of Title VII.[171] Thus, in Ledbetter's view, she was entitled to sue for damages and back pay in connection with each paycheck received less than 180 days before she initiated EEOC proceedings.[172]

The Supreme Court decided the case on May 29, 2007.[173] Justice Alito's opinion for the five-member majority agreed with the Eleventh Circuit, holding that Ledbetter's pay disparity claims were time barred.[174] The majority opinion interpreted Title VII to permit only claims in which the discrete acts of discrimination producing the pay disparity occurred within the limitations period.[175] A four-

166. 550 U.S. 618 (2007).
167. *Id.* at 621-22.
168. *Id.* at 622.
169. *Id.*
170. *Id.* at 622-23.
171. *Id.* at 624-25.
172. *Id.*
173. *Id.* at 618.
174. *Id.* at 642-43.
175. *Id.* at 643.

Justice dissent authored by Justice Ginsburg took Ledbetter's side, arguing that pay disparity claims typically arise incrementally and hence are harder to detect than traditional termination or "failure to promote" claims.[176] The dissent, therefore, would have upheld Ledbetter's paycheck-based claims.[177]

On January 29, 2009, just nine days after his inauguration, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009.[178] The statute legislatively overrode the Court's *Ledbetter* decision in two sentences:

> (3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.
>
> (B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.[179]

Thus, the current statute is specific and effectively discretion-eliminating: a Title VII plaintiff subject to a discriminatory compensation practice suffers an actionable violation whenever she is "affected by application of a discriminatory compensation decision."[180] And just to be sure, the statute is explicit about paycheck-

176. *Id.* at 645 (Ginsburg, J., dissenting).
177. *Id.* at 660-61.
178. Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5(e)(3) (2006)).
179. 42 U.S.C. § 2000e-5(e)(3).
180. *Id.*

based claims: the affected employee has a new cause of action "each time wages, benefits, or other compensation is paid."[181]

*b. Applying the Model*

The federal political landscape in January 2009 was quite a bit different than it had been in May 2007. When the Court issued its opinion in *Ledbetter*, a relatively conservative, probusiness Republican President and an evenly divided Senate counterbalanced a House of Representatives in which Democrats enjoyed only a thirty-one seat majority.[182] Given the dynamics of the moment, it seems quite likely that the Court's opinion originally fell within the policy space over which the political players might have been able to agree to a response. In other words, the Court's opinion likely was originally within the Pareto space where any attempt to improve one political veto player's lot would have come only at the expense of one or both of the other political players. As such, the interpretation was safe from revision when the Court decided the case, regardless of the response-cost dynamics facing the players.

We have already discussed the very different political dynamics of 2009-2011.[183] Even without the evidentiary value of the overriding legislation itself, an objective observer would have predicted that the preferences of the new political players lay well to the left of the Court's interpretation. It thus seems virtually certain that, once Congress and the White House changed hands, the Court's interpretation in *Ledbetter* fell outside the always-safe Pareto space between the political players' own positions.

But the congressional override embodied in the Lilly Ledbetter Fair Pay Act of 2009 was only possible because the dynamics of the moment allowed the political players to overcome their response costs as well. Unlike the *Iqbal* and *NAMUDNO* examples, response costs were almost uniformly *low* in connection with the *Ledbetter* response.[184]

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181. *Id.*

182. *George W. Bush*, WHITE HOUSE, http://www.whitehouse.gov/about/presidents/georgewbush (last visited Feb.14, 2013); *Party Divisions of the House of Representatives, 1789-Present*, *supra* note 126; *Party Division in the Senate, 1789-Present*, *supra* note 126.

183. *Supra* notes 125-26, 129 and accompanying text.

184. *See supra* Part III.C.1.b (*Iqbal*); Part III.C.2.b (*NAMUDNO*).

As with each of our previous examples, no reason exists to believe that process costs associated with a legislative response to *Ledbetter* were abnormally high. And unlike *Iqbal*, the search and specificity costs associated with a congressional response to *Ledbetter* were also remarkably low.[185] The entirety of the response—a highly detailed and effectively discretion-eliminating statute with respect to the limitations issue in *Ledbetter*—consists of two sentences amended to Title VII's definitions section.[186] Congress's purpose in drafting this law was to ensure that discrimination claims based upon pay disparity accrued for limitations purposes every time the plaintiff received a paycheck reflecting the discrimination.[187] It took the political players less than 175 words to do so.[188]

Finally, opportunity costs for this particular response were abnormally low. The *Ledbetter* decision itself was both highly salient and wildly unpopular among Democrats when it was handed down,[189] and congressional efforts to override the decision in 2007-2008 were predictably unavailing. Then-Senator Obama upped the ante by making the case an important part of his 2008 campaign for the presidency; Lilly Ledbetter appeared in Obama campaign advertisements and was also a featured speaker at the 2008 Democratic National Convention.[190]

Moreover, the new Democratic establishment almost certainly viewed the *Ledbetter* response as particularly important because it represented a low-cost, symbolic repudiation of its predecessors' policies. President Obama's signing statement confirms the rhetorical and symbolic importance of the legislation:

> So in signing this bill today, I intend to send a clear message: That making our economy work means making sure it works for everyone. That there are no second class citizens in our workplaces, and that it's not just unfair and illegal - but bad for

185. *See supra* Part III.C.1.b.

186. *See supra* note 179 and accompanying text.

187. 42 U.S.C. § 2000e-5(e)(3) (2006).

188. *Id.*

189. *See, e.g.*, Rep. Steny H. Hoyer, Op-Ed., *44 Years Later, Still Fighting for Equal Pay*, U.S. FED. NEWS, June 7, 2007, *available at* 2007 WLNR 24801620.

190. *Lilly Ledbetter at 2008 DNC*, YOUTUBE (Sept. 16, 2008), http://youtube.com/watch?v=r9I_U4WpItQ; *"Need Education" Ad*, YOUTUBE (Sept. 18, 2008), http://youtube.com/watch?v=QxqjAejRF94.

> business - to pay someone less because of their gender, age, race, ethnicity, religion or disability. And that justice isn't about some abstract legal theory, or footnote in a casebook - it's about how our laws affect the daily realities of people's lives: their ability to make a living and care for their families and achieve their goals.[191]

Opportunity costs for the 111th Congress and the newly installed forty-fourth President were thus particularly low, both because the Democratic Party's 2008 focus on the issue forced the response to the front of the queue, and because it offered a low-risk opportunity to announce the presence of a new sheriff in town on just the ninth of President Obama's first hundred days in office.

The *Ledbetter* decision and legislative response together perfectly demonstrate the preference and cost dynamics that would *not* allow a hypothetically self-interested and myopic Supreme Court to deviate from political preferences in pursuit of its own goals. The opinion survived for seventeen months only because the political dynamic from June 2007 through December 2008 was radically different.[192] Once the polity shifted, remarkably low response costs did not stand in the political players' paths.

## CONCLUSION: AMBITION, MODESTY, AND AMBITION

This Article is ultimately both enormously ambitious and decidedly modest in its aims. On the ambitious end of the scale, I offer for the first time a model of the interactions between the Supreme Court and its political counterparts that accounts for the transaction costs associated with political responses to statutory interpretation opinions. By incorporating these costs into the analysis, we gain critical insights into when a myopically self-interested, or tragically mistaken, Court can and cannot use the difficulties inherent in the Article I, Section 7 legislative process to give effect to policy preferences that differ from current political preferences.

Even with its limitations, the model demonstrates a number of unique and potentially surprising characteristics that almost

191. *Obama Signs Lilly Ledbetter Act*, WASH. POST (Jan. 29, 2009, 10:27 AM), http://voices.washingtonpost.com/44/2009/01/29/obama_signs_lilly_ledbetter_ac.html.

192. *See supra* notes 126, 182 and accompanying text.

certainly have real-world analogues. For example, the model demonstrates that the basic dynamics of the political response process present a net-benefit problem with substantial free-riding and sunk-cost risks. A single player whose internal calculus promises a net benefit if it incurs response costs essentially guarantees that response, even if the other players have no incentive to lift a finger.

But the intrinsically sequential nature of the political response bargaining process also presents a risk in the absence of credible reputational constraints or other precommitment devices. Some politically desirable responses may not materialize because the player with the strongest incentives to incur response costs may rationally be concerned that the other players will take advantage of its sunk cost expenditures by insisting upon benefit-eliminating changes after the fact.

Expanding the analysis to two dimensions demonstrates other interesting phenomena with direct application to our understanding of how political processes actually work. The inclusion of response costs in a two-dimensional model demonstrates the way in which the Court can trade dimensions off against one another in pursuit of an interpretation that provides the same overall benefit to the Court with less risk of override. It is hardly implausible to imagine a self-interested Court giving the closest political player more of what that player wants in order to obtain protection from the other political actors.

This Article represents a significant, foundational step forward in understanding the way government actors, and sometimes interest groups, interact; in fact, the insights of this Article are applicable, with little or no modification, to a variety of other regulatory contexts involving veto players and/or the delegation of interpretive authority. For example, the model can be used to predict whether the political players will respond to *any* inherited policy, whether generated by the Supreme Court, a predecessor legislature, or nature itself. The model can also be applied to the executive agency context with certain modifications reflecting the higher level of presidential control over agency policy and the somewhat lower costs of constraining agencies without the use of detailed, discretion-eliminating statutory schemes. In many ways, this foundational Article is just the beginning of an enormously ambitious project.

At the same time, however, the Article is deliberately and notably modest in at least three distinct ways. First, I do not attempt to describe actual judicial behavior completely. Of course, substantial value exists in looking at political decision making as I do—through a utility-maximizing, rational-actor lens. People do sometimes act in their own perceived self-interest, even when duty or morality arguably compels a different result. And the Supreme Court, an inherently political body, ultimately opines on many matters of significant political concern. Thus, rational-actor analysis is a good starting point.[193]

But this does not foreclose the possibility that the Court acts in response to other motivations. The Court may in fact act out of its own internal sense of duty for duty's sake. Or it may act to maximize—but on some *other* dimension that does not appear in my figures—resources like its own judicial reputation or leisure time.[194] The insights of other disciplines may apply in this context as well. For example, the players may be subject to biases or internal heuristics that lead them away from strictly "rational" behavior.

My claims with respect to predicting actual judicial outcomes, especially in any single anecdotal context, are correspondingly modest. The model is designed simply to help us identify the outer boundaries of the interpretive space *available* to the Court, not to tell us what any particular Court will do in any particular context.[195]

Second, even assuming that the Court acts to maximize its own policy preferences, the limits of the model and its underlying assumptions compel another form of modesty. This Article is deliberately foundational rather than comprehensive, and my assumptions reflect that approach. For example, statutory interpretation is rarely a single-iteration interaction; rather, the Court, House, Senate, and President interact with one another repeatedly across time and multiple regulatory contexts. These repeat interactions

193. *See* Paul J. Stancil, *The Legal Academy as Dinner Party: A (Short) Manifesto on the Necessity of Inter-Interdisciplinary Legal Scholarship*, 5 U. ILL. L. REV. 1577, 1579 (2011).

194. *See, e.g.*, Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993).

195. That said, the opportunities for follow-up empirical research are significant. The model necessarily implies that, on balance and all else equal, the Court will deviate from political preferences more successfully when response costs are high.

undoubtedly affect outcomes; even a blatantly self-interested Court would pick its battles, for example. Moreover, the political players will typically benefit from their own repeated interactions with one another, because their accumulated reputational capital will allow for more cooperation than a single-iteration interaction would predict.

Other assumptions compel modesty as well. It is unlikely that any player can identify every other player's ideal point or response costs with precision, for example. Even given that knowledge, it may be remarkably difficult for the players to process the information effectively. In future work, I will incorporate the effects of both substantive and process uncertainty[196] into an expanded version of the model, but this foundational treatment is sufficiently complex without adding that particular wrinkle.[197]

Finally, the Article is normatively modest, with good reason. There are, of course, multiple ways in which the insights offered by the model might shine some light onto a number of well-rehearsed normative puzzles. But for the most part, the normative implications of my descriptive model are deeply ambiguous.

Like the challenges associated with interest group theory,[198] the normative implications of the model depend largely upon imported normative baselines extrinsic to the analysis. One concerned primarily with getting the "right result" in the form of particular preferred policies may, for example, find the model's implications normatively attractive or disturbing, depending upon whether she

196. *See, e.g.*, David Dequech, *The New Institutional Economics and the Theory of Behaviour Under Uncertainty*, 59 J. ECON. BEHAV. & ORG. 109, 112 (2006); *see also* Dosi & Egidi, *supra* note 71, at 146. Under this taxonomy, "[s]ubstantive uncertainty results from the lack of all the information which would be necessary to make decisions with certain outcomes." Dequech, *supra*, at 112 (internal quotation marks omitted). The Court's inability to gauge congressional preferences falls into this category. Procedural uncertainty, by contrast, "arises from limitations on the computational and cognitive capabilities of the agents to pursue unambiguously their objectives, given the available information." *Id.* (internal quotation marks omitted). As discussed above, the determination of an equilibrium in the multidimensional context would require the Court to engage in the human equivalent of semidefinite programming; there may well be limitations on even the most well-informed and myopically self-interested Court's ability to engage in this analysis with precision.

197. Similar stories can be told for several other assumptions as well, including the assumption that the Court itself faces no costs. The introduction of additional institutional features, such as the lower courts, would complicate matters even further.

198. *See, e.g.*, Elhauge, *supra* note 110, at 34.

thinks that the Court or the political apparatus is more likely to provide the results she desires.

A process-oriented theorist will have no less trouble; her assessment of the model will depend ultimately upon, among other things, the extent to which she is comfortable with judicial review generally and the value, if any, she places on nonconstitutional countermajoritarian interpretation as a check on political extremism. And even if she concludes that the current preferences of the polity deserve primacy in the abstract, she will still confront a host of efficiency concerns: How much discretion is too much for the Court, given the advantages of delegation more generally?

Things are further complicated by a potential "second-best" problem. The judicial process may sometimes be the best practical option for "correcting" the status quo, albeit imperfectly, depending upon one's assessment of the general location of the run of current inherited policies relative to current political preferences; the location of the Court's preferences relative to *both* inherited policies and current political preferences; and the relative political response costs associated with both desirable and undesirable inherited polices.[199]

For example, return briefly to a slightly altered version of our charter schools example with two twists: (1) the inherited policy lies to the right of *all* players, including the Court; and (2) uniformly high transaction costs make any political response to even the political extreme represented by the inherited status quo infeasible. In that case, the Court might offer a second-best solution, moving the policy to its own ideal point. The final policy would still lie far outside the political players' "natural" negotiation range, but it would also be far better than the inherited policy.

My future work in this area will be less modest. Future articles will build upon the foundation I have laid here, taking up many of the technical, theoretical, and normative issues I have deliberately pushed to the side in order to present this baseline analysis.

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199. For a similar argument, see Paul Stancil, The Problem with One-Size-Fits-All Procedure (Feb. 19, 2013) (unpublished manuscript) (on file with author) (arguing that court-sponsored rule making is sometimes superior to remedial legislation in correcting past legislative mistakes).