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US Government and Politics
11/02/15

Is the US Supreme Court best understood as a "semi-constrained" institution?

The US Supreme Court is better understood as a semi-constrained institution than as a fully constrained institution or an unconstrained institution, but the assumptions that underlie this dichotomy are dubious. I will first consider what it means for the Court to be semi-constrained, defend the court as semi-constrained relative to the alternative, and then devote the bulk of this essay to exploring the various ways in which any model of the court as a rational institution is inevitably flawed. I will also show that the attitudinal model is flawed as an explanation of Court decisions.

Hall suggests that the Court being semi-constrained simply means that "external political forces have greater influence on the Court's decision making in some cases than in others, depending on the institutional context of the case." However, this definition hides some important considerations which I will consider later. Hall operationalizes this by examining 'vertical' and 'lateral' cases. 'Vertical' cases are those involving the judiciary: what a proper evidentiary rule should be, what the definition of obscenity is, and the cases under which affirmative action is legal. 'Lateral cases' are cases involving external actors: desegregating school systems, school prayer, and limitations on executive power.

Before considering the evidence that Hall presents, I'll spend some time on the plausibility of the causal relationship hypothesized. It certainly doesn't seem ridiculous to say that the court has more power in some aspects than others. Kelo was hated by, to a first approximation, everybody. Taking from the poor to give to the rich? Taking of private land with very limited need for justification? There was a variety of measures in opposition, from one unconstitutional and deplorable attempt to seize a justice's home to laws or referenda in the vast majority of states somewhat or severely limiting eminent domain for economic development. However, as all Kelo does is issue instructions to lower courts on how they should rule, nobody has been able to stop implementation. Conversely, there is plenty of evidence that SCOTUS civil rights rulings were frequently *de facto* blocked by local officials, as these required changes in state institutions. "In one extraordinary case, Giles v. Harris (1903), the Court candidly conceded that even if disenfranchisement devices were unconstitutional, it was powerless to provide remedies."[1] That's when they were being reasonable: "white Mississipians evaded *Sweatt*, not through legal obfuscation, but by old-fashioned violence and intimidation."[2]

It seems reasonable to say that judges desire implementation. Even if, for any particular decision, each judge is quite apathetic, all recognize that it is important that the Court not be ignored so that future more important decisions will also be observed. It seems plausible that implementation is a concern.

It seems like there is a plausible causal relationship between institutional constraints and Court rulings. The Court sees that rulings in certain directions will be overturned, does not want any rulings to be overturned, and so rules more cautiously. This does not necessarily mean that the Court will rule the other way: there are a multitude of procedural tricks that the Court can use to avoid ruling on something. There is very little that the Court must consider, so choosing to grant a writ of certiorari and then saying that the issue is moot and not "capable of repetition, yet evading review" would, under an assumption of rationality, imply that information has been gained about the costs of a particular ruling, which is particularly likely to come from pressure campaigns or the

1 From Jim Crow to Civil Rights, Klarman, 9
2 From Jim Crow to Civil Rights, Klarman, 260

justices engaging in costly information-seeking to determine the likelihood of retaliation or overturn, as it would be strange behavior for the Court to accept a case and then refuse to rule.

Given this plausible causal relationship, is Hall's evidence convincing? Overall it seems solid. The measures used are fairly robust to alternative coding procedures about exactly what cases fall under the sway of the Court. The effect sizes are strong, though it would be nice to see some collinearity metrics. The statistical methodology is straightforward: he doesn't mess around with bootstrapping, which is just a cheap tactic to make weak tests stronger, or similarly complicated statistical techniques, which are usually a sign that simple techniques didn't detect an effect. He does detect a much stronger influence from both elite attitudes and public opinion in lateral cases.

It seems like we can safely conclude, following Hall, that in 'lateral' cases, those where the Court does not have direct control, it is more sensitive to both public mood and the feelings of other institutional actors (Senate, House, President). However, this still does not fully answer all questions. Some of the remainder perhaps cannot be feasibly answered: Keck's dataset was down to less than two hundred cases, almost evenly divided between 'vertical' and 'lateral', and some of the questions I consider would render this to almost nothing. However, they are still worth considering. It seems plausible that the Court has an easier time forbidding something than mandating it. Given the idea behind institutional constraint, it may be hard for the Court to mandate that an actor set up an institution, but relatively easy to order the destruction of said institution. This is not a concept tested in Keck, but it is an operationalizable hypothesis that is not inconsistent with the data. This could be another sort of constraint on the Court, that it is hard to get institutional actors to actively do something relative to getting them to not do something. Similarly, a restoration of normality seems relatively simple: when there was a 2001 executive order by Bush junior that allowed the president to deny foreign suspects accused of acts against America an appeal by pushing them into military courts,[3] the Court overturned.[4]

Not only are Keck's quantitative arguments that the Court is differentially constrained depending on the context of the decision plausible, there are also some compelling thought experiments that suggest that the Court may be differentially constrained depending on what it wants. We can reject the idea that the court is constrained constantly, or constrained only in response to public or elite opinion about a decision.

It is thus time to return to the assumptions mentioned earlier. There are two critical ones that I will argue are at least partially false: that the Court is constrained solely by other groups, and that the Court represents a single rational body. Of the non-agentic constraints, the ones we might expect from looking at the structure and definition of the Court are that the Court can only rule on cases appealed to it and that the Court is limited to interpreting the law. Both have some strength, but are not as limiting as might initially be assumed.

In theory, the Court is limited to reviewing cases brought before it. Unlike the German Constitutional Court, the Supreme Court of the United States is incapable of reviewing theoretical cases: there must be an actual violation. Furthermore, it almost never rules in favor of facial challenges, those that attempt to strike down a law as unconstitutional on its face, but instead merely on the legality of specific cases.[5] It is only supposed to make a ruling if there is a specific harm and a judicial remedy available: cases have been thrown out because, by the time they reached the Supreme Court, a process that

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3 The prosecution's appeals, of course, were protected and legal. It was the defendants who weren't allowed to do this. That all this was done in the interest of justice cannot be questioned.

4 The Federal Courts, Carp, Stidham, and Manning, 30

5 I don't have an academic source for this, just comments that I remember from articles and friends while discussing *Patel*.

takes years for a typical case. It cannot rule on many potential constitutional claims, because mere expenditure of taxpayer money does not grant standing.[6]

Yet, the Court has great power to pick the cases it wants. In *Gideon v. Wainwright*, which set the precedent for *Miranda v. Arizona* and expanded the rights of the accused by itself, "It was Chief Justice Warren more than anyone who was responsible for the Gideon decision. It was the Chief Justice who wanted his clerks to find a case like Gideon, led the Justices in granting cert in the case, and suggested that Fortas be assigned to argue it. The rest was anticlimax--though none but the Justices were privy to that reality."[7] Indeed, Bobby Kennedy praised Gideon as the heroic figure who was singlehandedly responsible for the decision. In reality, his appeal was an inus condition at most. It was Warren who was, given his influence over the other justices, a necessary and borderline sufficient condition. The justices hear a mere 1% of cases in recent years(84/7786 in 1993,[8] and the denominator has only grown since), and could constitutionally not listen to any cases for years at a time, if they so desired. Such a decision would make the Court massively unpopular, and is extremely unlikely, but is within the power of the Court.

However, the cases the Court sees are influenced by outside parties. Legal pressure groups like the NAACP and Lambda Legal will attempt to push particular cases at particular times, judging external constraints like popular and elite sentiment as well as the opinions of the justices. At the same time, justices will signal that they may be open to a particular case argued a particular way: In *Northwest Austin Municipal Utility District No. 1 v. Holder*, the justices signaled that they would be open to a lawsuit in a few years unless Congress acted to change the redistricting formula. Shocking nobody, Congress completely failed to act, and in *Shelby v. Holder* the Supreme Court struck down the old formula for determining the necessity of preclearence in changing voting regulations. Again shocking nobody, several states and districts immediately passed laws that were widely predicted to reduce voting by disadvantaged groups. The necessity of signaling that a particular case should be brought a particular way shows that justices are not completely capable of conjuring relevant cases: they need to make active effort that can be fulfilled, or not, by outside groups. While this can be analyzed as an institutional constraint of sorts, it requires adding another dimension to our analysis and a whole host of outside actors with a diverse range of opinions, goals, and resources. There have even been other times the Court has seen the cases it can address modified: To avoid a SCOTUS ruling, in 1867 Congress removed "so much of the act approved February 5, 1867 [as] authorized an appeal". This happened while the Court was deciding the case.[9]

In addition to limitations on what cases are before the Court, there is some evidence that the Court is limited by a triple binding of statute, Constitution, and history. At times, the Court has flatly told Congress "This is a foolish interpretation, but it's the one implied by the text. Fix it."[10] Obviously, the Court would have preferred to fix the law directly, and if they are being so blunt it is unlikely that Congress would take retaliatory action against the Court. The most sensible explanation is that the Court is limited in how much it can do by the Constitution, and has to observe the Constitution to maintain the public and elite support from which it derives authority and power. At other times the Court is bound by the Constitution: no matter how much Sotomayor might like to see every gun confiscated, it's simply not something she can vote for while retaining plausibility and authority as an interpreter of the Constitution. The Court is lastly bound by precedent: while the Court can overturn precedent, and in the past half century has done so at a shocking rate compared to earlier courts, it loses prestige and authority when it does so. The loss may be

6 To pick one probably unconstitutional arrangement that would at least be attacked if not for this rule, the constitution bans funding an army for more than two years at a time. This is not reflected in current Pentagon budgeting.

7 Decision, Schwartz, 112

8 Decision, Schwartz, 13

9 The Federal Courts, Carp, Stidham, and Manning, 35

10 The Supreme Court, Baum, 117.

worthwhile: *Brown* probably led to an overall increase in the strength of the Court. This triple binding is reflected by the evidence: it's difficult to explain Court decisions without at least some reference to non-partisan factors, particularly when considering invalidation of non-partisan or bipartisan statutes issued by an ideologically mixed Court, which happens quite frequently.[11]

However, precedent may not bind all judges equally: Spaeth and Segal found only two justices who seemed to follow it regularly even when they disagreed with the precedent set, though all judges cite precedent enthusiastically.[12] On the other hand, this evidence is disputed, and other scholars have found evidence for the legal model, in which justices do care about logic.[13]

The prestige and authority of the court come from the same people who may have very different preferences. It is entirely possible for someone to say "I prefer X, but I think that the Constitutional interpretation is Y." Trying to understand this in a rational actor model is extremely difficult: how could the public both dislike a ruling and respect it, given that the authority of the ruling comes from their own respect and actions? It is only when self-reflection and irrationality, or imperfect information, are acknowledged that one can begin to make sense of this. People believe that the Court has the right and authority to interpret the Constitution, and think that the Court can do this better than they can, even if they disagree with a particular ruling. This cannot be explained in an attitudinal model with reasonable capacity to model others, but does fit with the evidence that the Court is bound by law and precedent and the Constitution.

As a final critique of the default institutional model, it seems rather strange to analyze the Supreme Court as if it is a single rational actor. It's led by nine human justices. Each of them could be modeled as a rational actor, but this choice is non-obvious, as they are individual humans prone to, in some cases, changing their minds. Worse, understanding the Court as a single actor risks missing the important differences between a 5-4 decision and a 9-0 one. A 5-4 decision might last a presidential term or less, to the extent that it is highly controversial. The justices fight amongst themselves, frequently even during oral arguments: sessions are characterized by almost incessant interruptions from most of the justices.[14] A 9-0 one would most likely take decades to overturn, or a Constitutional amendment. Recognizing that not all Court decisions are equal has important implications for any analysis of the Supreme Court.

On the other hand, the justices are not quite so divided in all cases. "Strong chief justices have effectively led their Courts during their tenure."[15] To the extent that a Chief Justice runs the Court, it can be modeled as a single rational actor. Of course, to lead is not the same thing as to control absolutely: Rehnquist has repeatedly changed his vote or his opinions in order to obtain a majority.[16] There is furthermore evidence from state courts that justices do pay attention to threats of executive retaliation, suggesting the potential utility of a rational actor model, and striking further doubt on an attitudinal one.[17]

In conclusion, while the Court can be modeled as a semi-constrained institution, and considering this is important when one might be tempted to discuss the place of "the Court in judicial review", it is not a useful framework for most analysis of the judiciary or the Court. While it is better than other institutional models, we should use an institutional model which recognizes institutional constraints and attitudinal and legal motivations amongst oft divided unequal judges, without restricting ourselves to that paradigm alone.

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11 Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?, Keck
12 The Influence of Stare Decisis on the Votes of United States Supreme Court Justices, Spaeth and Segal.
13 Not the Whole Story, Songer and Lindquist
14 Decision, Schwartz, 14
15 Decision, Schwartz, 10
16 Decision, Schwartz, 21
17 Executive Power and Judicial Deference, Johnson