

CIVIL RIGHTS LEGISLATION IN THE 1990s: RENEGING ON HISTORY?  
PLAYING THE COURT/CONGRESS/PRESIDENT CIVIL RIGHTS GAME<sup>1</sup>

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Civil rights policy is interactive because it involves the cooperation, and often the conflict, among the Congress (which enacts the statutes), the President (who has veto power and influences the statute's implementation), and the Court (which presides over the statute's interpretation). Civil rights policy is also dynamic. For one thing, the actual mix of statutes changes constantly as Congress enacts new statutes. In addition, the interpretation and implementation by the President and the Court strongly affect the evolution of each statute and the way the statutes knit together over time. Therefore, the dramatic changes in the attitudes of the President and of the Court (and, to a lesser extent, of Congress) toward these statutes have significantly affected the statutory policy.

[What follows] borrows from positive political theory a model of Congress/agency interaction and uses it to construct a theoretical framework for thinking about the Congress/Court/President interaction over time.

**A Game Theoretic Analysis of Supreme Court Policymaking in Civil Rights Statutes**

For some time now, positive political theory has been developing game theoretical models of the legislative process. Much of the theory has focused on legislator incentives and,

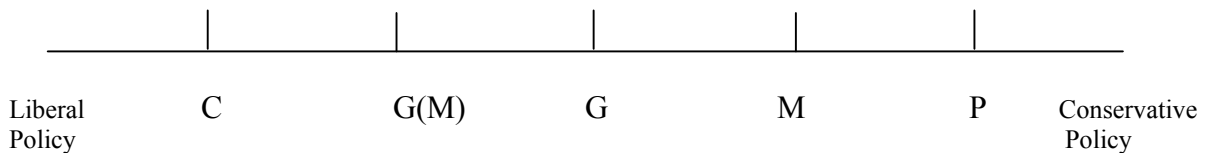
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specifically, the operation of a legislature in which members are primarily motivated by a desire to be reelected. Recently, positive political theory has explored issues arising from the legislature's interaction with agencies and the President. Scholars have been developing a model of Congress/agency interaction to explain Congress' ability to influence agency decisionmaking over time, even when it does not enact statutes that overrule the agency directly. Their model, the positive political theory model, might be applied to understand legislative control of judicial statutory interpretation as well.

The Court/Congress/President game, which follows from this model, is relatively straightforward. To see how it works, consider Figure 1.<sup>2</sup> On the horizontal line, which represents the possible interpretations the Court could give to, say, a civil rights statute ordered from most liberal to most conservative, I place the optimal political preferences (that is, where they would ideally like to see policy placed) of the major political actors.

**Figure 1.** Hypothetical Distribution of Civil Rights Preferences



The political players are the Supreme Court (C), which interprets existing civil rights statutes; the legislative gatekeepers (G), which substantially control Congress' agenda and which I consider to be the committees with jurisdiction over civil rights bills plus the majority party leadership; the Congress, which has the power to overrule the Court and is treated here as a single chamber whose preferences are represented by those

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<sup>2</sup>*Editors' Note:* Though the basic ideas in this paragraph come from the Eskridge essay, we have rewritten them with an eye to making them more accessible for readers without knowledge of game theory.

of its median member (hence the notation M; and the President (P), who has the power to veto legislation.<sup>3</sup> G(M) represents the legislative gatekeepers' indifference point, where the Court can set policy which the gatekeepers like no more and no less than the opposite policy that could be chosen by the full Congress. To put it another way, because G(M) and M are equidistant from G, the gatekeepers like G(M) as much as they like M; they are indifferent between the two.

The game is played in the following sequence. The Court makes the first move when it interprets a civil rights statute. Once the Court has interpreted the statute, the gatekeepers then decide whether they want to seek a legislative override; if they do, Congress must decide what policy to adopt, and it is not constrained by the gatekeepers' choice. If Congress passes a statute, the President must decide whether to veto it. Should the President veto it, Congress must decide whether to override the President's veto.

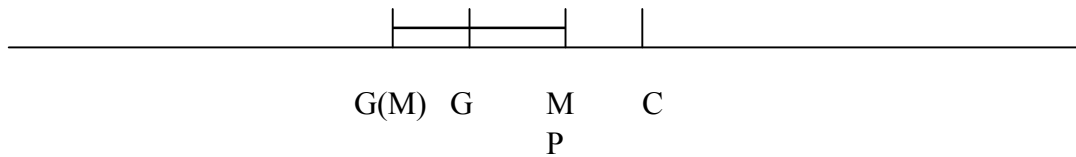
The Court/Congress/President game assumes that each player has full knowledge (operates with complete information) about other players' preferences (and all players know this); therefore, each perfectly anticipates the future course of play. Moreover, each player in making its moves will not want to make a decision that will be overturned by another player with the authority to do so. In other words, in deciding whether to act, each player will do nothing if it realizes that its decision will be overturned by the next player.

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<sup>3</sup> In denoting these preferred points of C, G, M, P, Eskridge assumes that actors prefer an outcome that is nearer to that point than one that is further away.

Despite its "strong" assumptions, the positive game provides a robust explanation for the behavior of the Court, Congress, and the President. [Consider the period] between 1971 and 1975, when the Court's preferences (C) were often to the right of the preferences of Congress (M), while the gatekeepers' preferences (G) remained slightly to the left of those of the median member. The President's preferences (P) moved closer to the congressional median during this period but were often to the left of that median. (See Figure 2)

**Figure 2.** Civil Rights Preferences, 1972-81



Under this configuration, if the Court implements its own preferences (C) through interpretation of the civil rights statutes, it will be overridden, because the gatekeepers will have an incentive to introduce overruling legislation (they prefer any outcome that is to the left of C), and Congress will vote for its preferred outcome over that of the Court (it prefers M to C). As a result, the Court has a strong incentive to compromise its preferences and reach results that are at or to the left of the congressional median (M). Interestingly, because the Court's preferences are on the other side of the congressional median from the gatekeepers' preferences, the Court has lost much of its discretion to reach a result at variance with the median congressional preference (M) and, as a consequence, the Court runs a much greater risk of being overruled.

This Court/Congress/President game captures nicely much of what went on in the 1970s. A number of Burger Court decisions in the late 1970s relied on the Court's perception of legislative preferences to reach results that appeared more liberal than the Court's own preferences. Indeed, the Court/Congress/President game provides an interesting explanation for *United Steelworkers v. Weber*, which interpreted title VII to allow voluntary affirmative action. Justice Stewart, who voted with the *Weber* majority, had voted the year before against the constitutionality of voluntary state affirmative action. Another majority Justice explained his vote in *Weber* as a response to societal developments that had overtaken the original congressional expectations. Both these Justices may have been sensitive to the pressures for affirmative action created by *Griggs v. Duke Power Co.* and to the gatekeeping committees' approval of *Griggs* in 1972. For these reasons, a Court critical of affirmative action in constitutional cases ended up interpreting title VII to allow a broad range of private affirmative action programs. The conclusion from this *Weber* example suggests a broader observation: The Burger Court generally produced results in constitutional civil rights cases (where there was little chance of its being overridden) that were discernibly more conservative than the results it reached in analogous cases of statutory interpretation.