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Saint Louis University Public Law Review

Volume 19
Number 1 *Congress: Does It Abdicate Its Power? (Vol. XIX, No. 1)*

Article 8

2000

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## Recommended Citation

Puro, Steven (2000) "Congress-Supreme Court Relations: Strategies of Power," *Saint Louis University Public Law Review*: Vol. 19 : No. 1 , Article 8.
Available at: https://scholarship.law.slu.edu/plr/vol19/iss1/8

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# CONGRESS-SUPREME COURT RELATIONS: STRATEGIES OF POWER

STEVEN PURO*

## I. INTRODUCTION

Whether Congress is yielding its constitutional powers is a central issue for American political institutions at the end of the twentieth century. Scholars who have closely examined Congress's behavior ask both whether Congress fully uses the powers and maximizes the institutional capacities it is entitled to under separation of powers, and whether Congress can check the institutional powers of other branches and defend individual rights more effectively than an independent judiciary or judicial review. Congress is clearly active in shaping social and political policies. In the American political system, Congress has the important role of representation and supporting states or constituents in their conflicts with the national government. Members of Congress may use the process of representation to meet district and constituency needs rather than expand Congress's collective institutional capacity. Decentralization has been a major trend in Congress in the last third of the twentieth century. Individual members have increased their ability to support their own constituents in the representative process, but may have decreased their ability to act institutionally and compete with external institutions. Members often exhibit a wide gulf between their use of institutional power and authority for individual versus institutional beliefs.

Is Congress abdicating its power? An answer can focus on how Congress defines its authority and role as a representative institution and whether Congress mainly anticipates or responds and reacts to social and political events. Fisher defines abdication as "to relinquish a right or power . . . giving to someone else something that belongs to you" and argues that Congress has failed to protect key legislative prerogatives.[1] Congressional authority and strategies for interaction with other branches in a separation of powers context

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1. Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 932 (1999).

are undermined by abdication. Williams addresses these issues using public choice analysis and suggests differences between institutional and individual strategies within Congress. [2] He notes there is an important distinction between congressional abdication and congressional delegation, and that line is currently blurred.[3] Williams argues Congressional abdication concerning Executive War Powers is "not one of power, but of political responsibility."[4]

Congress's relationship with the federal judiciary is an important aspect of its authority. Congress and the Supreme Court consider many issues of defining constitutional boundaries through statutory and constitutional interpretation. Congressional legislation is often central to the definition of boundaries of power and authority for various national and state governing units, and the federal courts often hear cases concerning redefined government authority. This article will examine Congress-Supreme Court relationships and strategies of exercising power in the federal system.

## II. CONGRESSIONAL-JUDICIARY RELATIONSHIPS

The patterns of congressional relations with the federal judiciary are complex and dynamic. Congress has a variety of constitutional means to control and influence judicial processes and decisions. Congress has control within constitutionally set boundaries over the jurisdiction of federal courts, the budget of the Supreme Court, and the Court's appellate jurisdiction by removing certain topics.[5] Congress may also pass statutes that revise Supreme Court decisions or minimize the impact of Court rulings. The Supreme Court can interpret Congress's override and may alter the legislation in whole[6] or in part.[7] Congress and the Court can interact in more than one round of statutory interpretation and reinterpretation. In a recent visible example, the Religious Freedom Restoration Act,[8] the Court and Congress modified each other's behavior through new decisions and succeeding legislation.

Congress-Court relations are important in maintaining a working republican government. Both Congress and the Supreme Court have key roles

2. Douglas R. Williams, *Demonstrating and Explaining Congressional Abdication: Why Does Congress Abdicate Power?*, 43 ST. LOUIS U. L.J. 1013 (1999).

3. *Id*. at 1032.

4. *Id.* Later, he reminds us about "the possibility that congressional power may present a situation in which the benefits to individual legislators of a collective decision not to abdicate war powers may outweigh the costs to the legislator of such actions, and yet such a desirable collective outcome will not come about." *Id.* at 1040.

5. *See generally* U.S. CONST.

6. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (discussing the Religious Freedom Restoration Act, 42 U.S.C. §2000bb to 2000bb-4 (1994)).

7. *See* Lampf v. Gilbertson, 501 U.S. 350 (1991); Plaut v. Spendthrift Farm, 514 U.S. 211 (1995).

8. *See* 42 U.S.C. § 2000 (1994).

in preserving the balance of authority within the federal government and stabilizing the balance of authority between the federal government and the states. Both statutory and constitutional policies afford frequent opportunities for Congress-Court interactions; scholars have found that the Court and Congress mainly accept each other's interpretations and avoid serious institutional conflict. Segal's separation of powers analysis "demonstrates that the Court must be concerned with the preferences of Congress (and occasionally the President) if it wishes to be an effective policymaker."[9] Ferejohn and Weingast examine Congress's "capacity to react" as a fundamental feature of the political process. [10]

Congress has substantial latitude to support or undermine the implementation of Court policies. David O'Brien argues that "Congress indubitably has the power to delay and undercut implementation of the Court's rulings. On major issues of public policy, Congress is likely to prevail or, at least, temper the impact of the Court's Rulings."[11] Congress's major responsibilities include translating and implementing policies which result from its right to decide what resources will be used, how and where. As an example of modifying a Supreme Court policy, Congress passed laws, such as the Hyde Amendment, that limit funding for and participation of federal agencies in providing therapeutic and elective abortions. Congressional power to translate policy into action may be extended and given additional legitimacy when the Supreme Court supports Congress's decisions. If the Court opposes Congress's decisions, Congress may have less latitude to act and constituency groups may mobilize long-term political actions based on competing policy definitions.

Eskridge generally finds a moderate frequency for Congress overriding statutory decisions by the Court.[12] In the 1980s and 1990s, Congress passed major legislation by means of omnibus bills, which avoided conflicts between legislators that would prevent the passage of individual acts.[13] A single omnibus bill can overturn several Supreme Court decisions.[14] For instance, the Civil Rights Act of 1991 overturned twelve Supreme Court rulings, especially those concerning standards for employer and employee responsibility to prove

9. Jeffrey Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (Mar. 1997).

10. John Ferejohn & Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992).

11. DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 191 (2000).

12. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 331-455 (1991).

13. LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 120 (1997) (arguing that scholarly analysis of overrides of statutory decisions is at an early stage).

14. *Id.*

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discrimination in hiring.[15] Conflicts between the Court and Congress occasionally become constitutional or statutory crises.[16] The issue of whether Congress abdicates power becomes more prominent during and after major conflicts between branches such as New Deal policies in the 1930's, [17] civil liberties in the 1950's,[18] school prayer in the 1960's,[19] abortion rights in the 1970's and 1980's,[20] and Congressional attempts to control executive officials in the 1980's and 1990's.[21]

The Constitution gives Congress authority to remove the Supreme Court's jurisdiction for certain types of cases.[22] Threats by Congress to remove jurisdiction attract the attention of both the Court and constituents to a variety of socially volatile issues such as school prayer, reproductive rights and abortion, criminals' rights, and minority groups' rights. Congress rarely removes jurisdiction because of actual and potential negative consequences to this exercise of power. First, denial of jurisdiction by Congress establishes as permanent precedent the very Supreme Court rulings that Congress wishes to negate. David O'Brien finds a paradox in Court-curbing legislation: Congress denies Court review on major issues of public law and policy that Congress originally gave the Court the power to decide and place on its agenda.[23] Second, removal of jurisdiction by Congress renders the future development of the law uncertain. More directed strategies, such as statutory reinterpretation and nonstatutory administrative practices, are available to Congress to reverse or modify Supreme Court rulings. Third, direct confrontation between Congress and the Court may create a full-scale constitutional conflict.[24] Congressional authority in a wide range of policies and legal matters can be potentially diminished by such a conflict.

Congress can use both legislation and rule making to guide the Supreme Court. Congress encourages judicial interpretation by writing broad laws in major social and political areas.[25] When cases based on these laws are brought

15. *Id.*

16. *See* INS v. Chadha, 462 U.S. 919 (1983); *City of Boerne*, 521 U.S. at 508.

17. *See* Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729 (1991).

18. *See generally* Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit, 124 F.R.D. 241, 323-24 (1988).

19. *See* BAUM, *supra* note 13.

20. *Id.*

21. *Id.*

22. *See* U.S. CONST. art. III, §2.

23. *See* O'BRIEN, *supra* note 11, at 190.

24. *See*, *e.g.*, *Ex Parte* McCardle, 74 U.S. 506 (1869) (Congress removed the Court's jurisdiction over certain denials of writs of habeas corpus.).

25. *See* Mikva & Bleich, *supra* note 17; CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT (1988) (discussing the Civil Rights Act of 1964).

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before the Supreme Court, scholarly analysis shows that the Court anticipates Congress's intent.[26] However, with the growth of national interest groups over the last few decades, many of which use litigation as a policy vehicle, a significant amount of Congress's major legislation depends on the Court's and other organizations' acceptance.

## III. CONGRESS-COURT STRATEGIES: ADVANCING POLICY GOALS

Congress may choose to advance its policy goals by developing institutional agendas that allow details of major social and economic legislation to be deduced by the federal court, since both Congress and the Court use law as an institutional boundary. Congress and its leaders can anticipate the preferences of the Court or individual Justices since these preferences can be constrained by legal doctrine.[27] Congress often assumes that both branches can support existing policies. This strategic behavior takes into account that Congress can reinterpret Supreme Court rulings if they are substantially different from Congress' statutory policy goals. Patterns of cooperation and conflict between Congress and Court vary across time periods and issues, such as administrative rule making.[28] Eskridge found that between 1967 and 1991 Congress overrode 121 Supreme Court statutory decisions and 220 lower court decisions.[29]

Both Baum[30] and Segal[31] have formulated models of Justices' strategic behavior to avoid legislative reversal of statutory decisions. Epstein and Knight use Justices' docket books and papers to demonstrate their concern with legislative reversal.[32]

Congress's representational role involves adjustment to policy developments. Broad Congressional delegation of authority to administrative agencies creates constitutional ambiguity and opportunities for policy change, and leads to court and executive branch interpretations. Congressional reliance on narrowly drawn authority to administrative agencies would require legislators to regularly decide rules and administrative practices. In the last two decades, an important part of Congress's representational role has been to make good policy and not administer specific policies.

It is difficult to analyze whether, when deciding congressional statutes, Justices consider the preferences of the current Congress or the Congress that passed the law. How do Justices compare these two sets of congressional

26. *See* BAUM, *supra* note 13.
27. *See* Eskridge, *supra* note 12.
28. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (Court argues that agencies' interpretation of ambiguous statutory language should be followed).
29. Eskridge, *supra* note 12.
30. *See* BAUM, *supra* note 13.
31. *See* Segal, *supra* note 9.
32. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 149-50 (1998).

preferences?[33] Justices can form expectations, such as the expectation that Congress will more credibly reverse statutory than constitutional decisions, connected to interaction patterns with Congress and the risk of congressional reversal. Frank Cross indicates a difficulty in using the Court's assessment of the risk of congressional reversal, "[i]n a statutory interpretation action, the law dictates that Congress enforce the intent of the enacting Congress, which obviously requires consideration of legislative preferences but has little to do with the risk of reversal, which involves the preferences of the contemporaneous Congress."[34]

Miscalculations in Justices' forecasting of Congress's preferences and likely outcomes may lead Congress to modify or reverse Supreme Court statutory decisions by legislations. Predicting the actions of Congress is difficult because it is multilayered and complex, and its behavior patterns within and between chambers are intricate. Legal and policy issues are not completely definable as statutory or constitutional. Both the Court and Congress can bundle or manipulate issues to protect their decisions both constitutionally and from the other branch's changes. Knowledge of strategic interactions between the Court and Congress would be advanced by further analysis of Congress's ability to set boundaries on decision making for the Supreme Court and lower federal courts.

In both positive political theory and attitudinalist models, scholars agree that Supreme Court Justices take strategic actions to avoid negative responses by Congress, especially regular reversal or reversals in major cases.[35] Positive political theorists emphasize that the Court protects its preferred policies by deferring to Congress's preferences, especially in statutory cases.[36] Attitudinal theorists do not see as many constraints from Congress or the President on Justices' votes.[37] As noted earlier, Congressional achievement of legislative outcomes may require cooperation through Supreme Court decisions. In any given case, Congress cannot be assured of Court cooperation. However, in a series of cases, Congress may have strong expectations that Court behavior will be compliant with Congressional decisions. Few instances exist where the opposite pattern occurs, where Congress has strong expectations that Court decisions will oppose Congressional decisions.[38]

33. *See* R. Gelly & P. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions*, 6 J.L. ECON. & ORG. 263 (1990).

34. Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 527 (1999) (reviewing EPSTEIN & KNIGHT, *supra* note 32).

35. BAUM, *supra* note 13, at 94.

36. Segal, *supra* note 9, at 26.

37. *Id*. at 33.

38. *See* Mikva & Bleich, *supra* note 17, e.g. Congress-Court decisions concerning New Deal legislation between 1932-1936.

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It is worthwhile to briefly examine Supreme Court voting patterns to avoid reversal by Congress. It is frequently argued that the risk of congressional reversal is reduced by Supreme Court unanimity, such as in *Brown v. Board of Education*[39] and *U.S. v. Nixon.*[40] But scholarly analysis has not determined how much the risk of reversal is reduced by either unanimity or smaller majorities from eight to five votes.[41] For example, how much did the 6-3 vote for *Employment Division Department of Human Resources of Oregon v. Smith,*[42] in which Justice Scalia wrote the majority opinion, influence the near unanimous vote by both House and Senate on the religious Freedom Restoration Act,[43] which overruled that decision? Knowledge of how an individual Justice's vote or how the Court's voting patterns function as a signal to Congress and its leaders would give this question a clearer answer in terms of authority and interactions between Congress and the Court.

Fisher argues that Congress may turn to federal courts to challenge the President's activities and delay an immediate confrontation between the President and Congress. He questions this approach: "[o]ne of the by-products of the War Powers Resolution has been the tendency of legislators to turn not to their colleagues to challenge the President but rather to the courts."[44] Fisher notes that Congress was uncertain about the constitutionality of the provisions of the Line Item Veto Act of 1996[45] and provided "a procedure allowing for expedited review in the courts for challenges that the statute violated the Constitution" to resolve its concerns.[46] Senator Byrd (D-WV) called this action "a punt to the courts" which allows federal courts to determine the meaning and structure of Congress's legislation.[47] It is difficult for a Congress uncertain about major constitutional legislation to protect its own prerogatives and develop a collective preference or strategy.

Congress and the Court entered into a major conflict over the Line Item Veto Act. Congress's short-run political calculations and readiness to relinquish authority made it more difficult in the long run for the Court to defend Congress's authority. Congress could be seen here as yielding power to the federal courts and allowing them to determine where authority lies within

39. 347 U.S. 483 (1954).

40. 418 U.S. 683 (1974).

41. Gelly & Spiller, *supra* note 33, at 556. Epstein and Segal's initial findings provide "some support for the hypothesis that larger majorities have greater political power in the external environment. They also found that more ideologically homogeneous Courts that could command larger majorities were less responsive to the risk of reversal from an ideologically contrary Congress." *Id.* at n.245

42. 494 U.S. 872 (1990).

43. *City of Boerne*, 521 U.S. at 507.

44. Fisher, *supra* note 1, at 968.

45. Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996).

46. Fisher, *supra* note 1, at 1003.

47. *Id*.

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the federal system; if similar actions continue, institutional values and the institution of Congress may be endangered. Twelve years earlier, in *Bowsher v. Synar,*[48] the Supreme Court overturned the 1985 Balanced Budget and Emergency Deficit Control Act,[49] in which Congress sought to expand authority over the budgetary process. Congress attempted to perform an executive function by claiming for itself control over the United States Comptroller General's removal and provisions of the Act that gave it responsibility to enforce and execute laws.[50] The Religious Freedom Restoration Act presents another Congress-Court conflict; the Court believes that deciding the issues of this Act belongs to its authority.[51]

Canon and Johnson[52] indicate that the Court will sometimes invite Congress to rewrite a statute to overturn the Court's decision.[53] Spiller and Tiller, who use control over policy and legal rules to model Congress-Court interactions, argue that Congress is more likely to override Court decisions based on policy grounds than on legal rules. [54] In a Court-centered view, the judiciary uses Congress's preferences and institutional structures to achieve its own policy ends.[55] Spiller and Tiller challenge previous models which give Congress and other institutions limited attention in explaining Justices' votes and decision making by the Court.[56] They show that "it can be perfectly rational for the Court to look for a legislative override; indeed, it sometimes openly invites such a legislative response."[57] With the shrinking Supreme Court docket, Congress has followed a strategy of overriding lower federal court statutory interpretations to establish its policies.

The 1950s and 1980s featured statutory and constitutional conflict between the Court and Congress. In general, Congress and the Court had different ideological positions on many issues, including government actions against persons accused of subversive activities and the scope of civil rights laws. Congress established an institutional voice that regularly reversed Supreme Court decisions. To give examples, in the late 1950s Congress authorized a more conservative interpretation of suspected individuals' rights against

48. 478 U.S. 714 (1986).

49. 2 U.S.C. § 901 (1985).

50. *See Bowsher*, 487 U.S. at 717.

51. *See City of Boerne*, 521 U.S. at 509.

52. *See generally* BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (2d ed. 1999).

53. *Id*. at 148 n. 2. *See*, *e.g*, Tennessee Valley Authority v. Hill, 437 U.S. 153, 193-95 (1978); McCarty v. McCarty, 453 U.S. 210, 236 (1981); Dept. of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 490-94 (1994).

54. Pablo G. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503, 521(1996).

55. *Id*. at 514.

56. *Id.*

57. *Id*. at 521.

government investigations. The Supreme Court recognized this interpretation's stability and certainty by reversing some of its earlier rulings and restoring investigative power to Congress.[58]

In the 1980s, Congress, which opposed conservative Court decisions narrowing the scope of civil rights and liberties, passed legislation to broaden civil rights protections, especially those of the 1964 Civil Rights Act. For example, Title VI of the Civil Rights Act of 1964 established that programs receiving federal funds could not discriminate based on race or national origin and that federal funding could be terminated if the programs discriminated. In *Grove City College v. Bell*[59] the Court, agreeing with the Reagan Administration, narrowed the statute's application to specific programs only, not the entire institution, in a case technically involving Title IX of the Federal Education Act of 1972.[60] Congress overturned this ruling in the Civil Rights Restoration Act of 1987.[61]

Congress's willingness to rewrite legislation that has been overturned by the Supreme Court has been limited by divisions within Congress and the constitutional or legislative interpretations of key committee members. Canon and Johnson argue that the Court can make lasting policy interpretations more easily when Congress has sharply divided policy preferences.[62] But when there are solid coalitions opposing the Court in Congress, Congress can enforce its preferences against the Court's.[63]

A serious conflict arose between Congress and the Court over the First Amendment importance of the United States flag. The Flag Protection Act of 1989[64] overrode *Texas v. Johnson*[65] and was itself overridden by *U.S. v. Eichmann.*[66] The Religious Freedom Restoration Act currently poses a substantial conflict between positions strongly held by both Congress and the Court. Serious conflicts between Congress and the Supreme Court have often been modified by long-term events, such as changes in the Court or Congress's membership. Two major exceptions, extending across the last generation of Congress-Court relationships, have been reproductive rights and racial equality/desegregation.

58. *See, e.g.*, Barenblatt v. United States, 360 U.S. 108 (1959) (overruling Watkins v. United States, 354 U.S. 178 (1957)).

59. 465 U.S. 555 (1984).

60. *See id.* at 558-560.

61. 20 U.S.C. § 1687 (1987).

62. CANON AND JOHNSON, *supra* note 32, at 198.

63. *See, e.g.,* U.S. CONST. amend. XXVI, § 1 (establishing a uniform voting age of 18 for federal elections and overruling *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

64. 18 U.S.C. § 700 (1989).

65. 491 U.S. 397 (1989).

66. 496 U.S. 310 (1990).

Cross argues that "Court decisions do not automatically actualize the Court's policies and the impact of Court opinions may depend upon the compliance of Congress or other external actors."[67] The Supreme Court can encourage other institutions to comply with its decisions, and Justices often assume that noncompliance is more likely for decisions with broader scope. Additional legislation, regulation, or appropriations by Congress play an important role in achieving compliance by society with the Court's decisions. Congress may achieve additional authority through reinterpreting Court decisions. The judiciary is often faced with deciding between the authority of Congress and the President. In the last decade, on many important domestic and international matters the judiciary's constitutional and statutory interpretations appear to shift power from Congress to the President. By expanding presidential authority and limiting Congress's authority, are federal courts involved in forming a more compact constitutional structure?

## IV. CONCLUSION

The American system of government shares the power and responsibility of constitutional interpretation among the executive, legislative and judicial branches. The constitutional and statutory relationships among these three branches are guided by both short- and long-term considerations. In a given year or over the course of several years, Congress's authority is concerned in a wide range of constitutional and statutory issues before Congress and the Supreme Court. Congress-Supreme Court relationships involve multiple strategies which encourage consensus and coalition building among them rather than conflict. Conflicts occur due to different ideological positions, varying interpretations of specific constitutional and statutory provisions, and central questions about the scope of constitutional authority.

Congress's institutional competence in dealing with the courts and the executive will affect its attempts to maximize institutional capacity in relations with the Supreme Court. Congress may convey its institutional authority through statutory language, setting institutional boundaries for Supreme Court interpretation of statutes and regulations, and threatening increased jurisdictional or budgetary controls over federal courts. No determinative set of criteria for Congressional limitation on Court decisions was found. Such criteria should not be expected since Congress has given the Supreme Court power to set its own agenda and decide major constitutional and statutory matters. It would be difficult for Congress to use long-term institutional strategies in specific cases to fully exercise its institutional powers and abilities. Congress has increasingly received its expected payoffs from short-

67. Cross, *supra* note 34, at 525.

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term reactions to Supreme Court decisions in the 1980s and 1990s, with divided governments as the national norm.

The majority of scholars working on Congress-Court relationships consider short-term strategies; additional scholarship is necessary to study interactions based on long-term strategies. A main question for further investigation is how Supreme Court Justices and leaders in Congress build and stabilize institutional relationships in the area of statutory and constitutional interpretation. Since policy and legal boundaries between Congress and Court may change over time, long-term strategic practices need to be discussed and analyzed.

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