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Placing the Ball in Congress' Court: Supreme Court Requests for Congressional Action

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Abstract

The U.S. Supreme Court's invitations for congressional action have been the subject of extensive interest but with limited empirical study. As a result, despite the obvious political implications of the cross-institutional policy and rule construction interactions, little is understood of the factors precipitating such requests or their efficacy. In this article, I propose a legal development hypothesis. Specifically, I argue invitations are useful for the majority seeking to secure their policy preferences in the law, as the invitation serves to strategically frame subsequent debate at the Court through identifying Congress as the venue for any future reversal of the majority's policy preferences. Utilizing an original data set of Supreme Court requests for congressional action, I find strong and consistent evidence to support the legal development hypothesis. By inviting congressional action, justices structure in their favor future debates at the Court over policy intervention.

Keywords

U.S. Supreme Court, Congress, invitations, text analysis, machine learning

> As we so often admonish, only Congress can rewrite this statute.
>
> —Former U.S. Supreme Court Associate Justice William Brennan, writing for the Court in *Louisiana Public Service Commission v. FCC* (1986)

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Political scientists and legal scholars have long looked at direct interactions between governing institutions as important evidence of the interactive nature of policymaking and the development of legal doctrine in the American context. Consider, for instance, the rich literature surrounding Constitutional dialogues—the influence of multiple institutions and actors in Constitutional interpretation (Emenaker, 2013; Fisher, 1988)—or the ongoing debate surrounding congressional overrides of Supreme Court statutory decisions (e.g., Eskridge & Christiansen, 2014; Hasen, 2013). One such interaction is the explicit invitation—similar to Justice Brennan's above—from the Supreme Court of the United States directing the attention of the U.S. Congress to a particular policy problem the Court is addressing. The invitations offer an interesting phenomenon both in studies of the separation of powers and for studies and theories of judicial behavior, and they are associated with higher rates of subsequent overrides (see, for example, Eskridge & Christiansen, 2014). Yet little is known as to invitation prevalence, invitation causes, and invitation efficacy in engendering a congressional response.

In this article, I build on the insights of the dialogic and strategic models to develop a *legal development* theory of invitations. While the separate institutions of American government are in dialogue with one another, the Court is also in dialogue with past and future Courts. Opinions of the Court today shape debate, bargaining, and decision making in future cases. The development of the law is iterative, with each decision structuring and influencing subsequent debate (e.g., Callander & Clark, 2016; Rice, 2017; Silverstein, 2009). By inviting congressional attention, the majority frames subsequent debate at the Court, cordoning off the decided areas as more properly the province of Congress. In so doing, the majority of the Court may attain their preferred policy outcome in a case while also favorably structuring subsequent judicial debate, all at the cost of minor increases in the possibility of congressional review.

An example is instructive. In *Shelby County v. Holder* (2013), the Court dealt with the constitutionality of the Voting Rights Act, and in particular Section 4(b), establishing a statutory formula which required some states to seek federal approval for any changes in voting requirements. In a 5 to 4 decision, Chief Justice John Roberts wrote for the Court, striking down the preclearance provision—garnering the preferred policy outcome of the Court's conservatives—and inviting Congress to devise and pass an updated coverage formula. Congressional response, however, was quickly derided by voting rights and congressional experts as exceptionally unlikely.[1] The majority thus secured their preferred policy outcome in the instant case—striking down a critical provision in the Civil Rights Act—while also noting Congress was the appropriate venue for redress of the Court's decision, favorably structuring subsequent legal debate.

Viewed in light of the *legal development* hypothesis, invitations are a particularly useful tool for *securing* the majority's policy preferences in the presence of a divided Court and a policy on which debate is likely to continue. As I detail, such an insight is counter to the prevailing wisdom regarding invitations to Congress. Using an original data set of all Supreme Court invitations for congressional review from 1946 to 2011, I offer by far the most extensive study of Supreme Court invitations to date. Across a series of primary and corroborative analyses, I find strong evidence supportive of the primacy of the legal development hypothesis in explaining invite to Congress. Invitations are most likely to appear in divided cases, are associated with higher rates of ideological voting, and are subsequently cited more frequently by future Courts. The results have important implications for understanding the strategic behavior of Supreme Court justices and the Court's role in a separated system of shared powers.

Theories of Invitations to Congress

Interactions between institutions are central to our understadning of the policymaking process (e.g., Flemming, Bohte, & Wood, 1997). Researchers have recognized the importance of these interactions, with—to name just a few—work on dynamics such as legal interpretation (Fisher, 1988; Pickerill, 2004), legislative responses to Court decisions (Blackstone, 2013), court curbing (Clark, 2009), cross-institutional agenda setting influences (Baird, 2004, 2007), and the solicitor general's influence before the Court (Wohlfarth, 2009). Similarly, recent work by Owens, Wedeking and Wohlfarth (2013) has examined the converse of congressional invitations, with justices attempting to draft opinions so as to avoid the attention of Congress.

In this vein, invitations to Congress to override a Court's decision offer a particularly vexing dynamic. Why might a majority—insulated as they are from other institutions—*encourage* other actors to potentially undo the policy outcome the majority secures through their decision? As Hausegger and Baum (1999) note, "[i]nvitations by the Court majority to Congress pose a challenge to two widely accepted conceptions of Court behavior that posit simpler motivations for the justices" (p. 168). In the first view—the attitudinal model (Segal & Spaeth, 2002)—justices simply set policy at their most preferred position. From this conception of judicial behavior, there is little theoretical motivation for a justice inviting Congress to override their decision as the policy is already set at the preferred point. In the second view—the rational choice, or strategic, model—justices act within a set of constraints to come as close as possible to their preferred policy (Epstein & Knight, 1998). Here, justices are theorized to set policy as close to their preferred

position as possible *without* incurring congressional intervention and override. Yet if the majority sets policy at the congressional indifference point to avoid reversal, what benefit arises from inviting that attention?

Given the above puzzle, scholars—particularly rational choice scholars—have posited a host of potential motivations for the Court inviting congressional attention (e.g., Eskridge, 1991a; Hausegger & Baum, 1999; Murphy, 1964; Spiller & Spitzer, 1995; Spiller & Tiller, 1996) and have likewise explored their influence (e.g., Emenaker, 2013; Henschen, 1983; Ignagni & Meernik, 1994; Paschal, 1991). In one vein, scholars have argued invitations are evidence the Court is constrained. For instance, Eskridge (1991b) argues that "the Court will sometimes refuse to interpret a statute broadly, especially when such an interpretation would represent a major policy decision that the Court would be more comfortable allowing Congress to make" (p. 389), a sentiment echoed in Spiller and Gely (1992). From this perspective, which I term the *ruling regime* hypothesis, the Court offers invitations when the majority is ideologically aligned with Congress. As Dahl argued in his landmark 1957 study, by virtue of the appointment and confirmation process the Court is generally constrained from straying from the preferences of the "ruling regime." In conjunction with the ability of Congress to override the Court's decisions (e.g., Emenaker, 2013; Eskridge, 1991a; Hettinger & Zorn, 2005) or institute some form of Court-curbing (e.g., Clark, 2009), the majority may simply avoid overstepping boundaries while inviting congressional attention to more favorably address the policy outcome. From this *ruling regime* hypothesis, one would expect the Court to issue invitations more frequently when the majority is more closely ideologically aligned with Congress, as in those cases the Court may safely avoid taking significant political steps harmful to their institutional legitimacy.[2]

A second perspective, which I term the *cross-purposes* hypothesis, has received the strongest empirical support to date. The view suggests invitations arise when justices are constrained by the implication of a legal rule in the instant case from reaching both their preferred legal rule outcome *and* policy outcome in the same decision. Confronting this constraint, the justices decide on the basis of the long-term utility of their preferred legal rule while inviting congressional action. Both Spiller and Tiller (1996) and Hausegger and Baum (1999) argue that justices are more likely to invite congressional attention when their preferred legal rule and the policy outcome of the decision come into conflict. While policy outcome is well understood, scholars have defined legal rule outcomes as "legal principles, such as the rule that courts should defer to agencies in their interpretation of ambiguous statutory interpretation" (Spiller & Tiller, 1996, 504). The hypothesis holds that when preferences over legal rules and policy outcomes point to countervailing

decisions, justices are most likely to decide the instant case based on the legal rule and to hope for—and even encourage—congressional override of the policy outcome. In the words of Spiller and Tiller,

> [c]hoosing an option that is not politically sustainable (i.e., a policy outcome that Congress would certainly override) may occasionally provide the Court with a way to achieve a policy and rule outcome combination that a majority prefers to the other available options posed by the case before it. (p. 504)

Thus, justices may—in a small but significant number of cases—strategically vote against their preferred policy outcome in order to achieve their preferred legal rule outcome, with the belief that Congress may address the suboptimal policy.[3]

The critical component of this explanation lies in differentiating the creation of legal rules and the policy outcomes of a particular case. As both Spiller and Tiller (1996) and Hausegger and Baum (1999) argue, the observable implication of the *cross-purposes* hypothesis is that invitations should be more likely in majority opinions where a generally liberal or conservative justice decides a case counter to their ideological preferences. In the most thorough empirical study of invitations to date, Hausegger and Baum (1999) examine invitations to override statutory decisions in the Court's majority opinions between the years of 1986 and 1990, finding evidence that an opinion majority ideologically distant from their preferred policy position is more likely to invite an override.[4] The authors recognize the limitations of the study, noting, "[i]t is necessary, of course, to interpret the findings of this single study with some caution" (p. 181) as they are restricted to a 5-year period of the Court's history and just 27 invitations. Given the limited data and short time period, their conclusions are necessarily tentative, and Hausegger and Baum ultimately argue their "intent is not to offer a new theory of judicial behavior but rather to explore the impact of several alternative judicial motivations and thus to identify directions for further theory development" (p. 164). I turn now to this task.

Legal Development and Invitations to Congress

In introducing the *legal development* hypothesis, I depart from prior research by considering the influence of invitations as themselves a component of legal rules. The Supreme Court iteratively defines the contours of legal doctrine for a particular policy (e.g., Callander & Clark, 2016), with each decision influencing the structure of debate in subsequent cases (e.g., Richards & Kritzer, 2002). Importantly, within this iterative process, the invitation to Congress may serve as a legal principle itself with important strategic benefits for subsequent judicial

debates. In declaring Congress the venue for any future reversal of the majority's policy preferences, the majority is able to strategically and favorably frame subsequent debate at the Court. The particular policy or the specific interpretation of the policy may be demarcated by the majority as henceforward a topic for the legislature rather than the judiciary. In so doing, the majority secures their preferred policy outcome in the case and structures the subsequent debate on the policy and legal rule, thereby generating additional barriers for those seeking to alter the policy through judicial venues.

The majority does so at the minor cost of increasing the probability of congressional attention. But just as the Court is iteratively structuring subsequent legal debate, it also—as one institution in a system of shared powers—engages in an iterative dialogue with other institutions, particularly Congress (e.g., Emenaker, 2013; Fisher, 2004; Paschal, 1991). If Congress is ideologically aligned with the justices, there is little need to fear reversal. Conversely, if the institutions are ideologically opposed, the increase in the probability of congressional review associated with an invite remains marginal, as Congress can of course review the Court's decision in the absence of the invite. Moreover, the majority may minimize the probability of review by—in accordance with the strategic theory—setting policy as close to the majority's preferences as possible while avoiding congressional review. Finally, even if the invite is accepted, consider the Court's position. Here, the Court, as is well documented, is insulated from partisan politics through life tenure and is therefore advantaged in the long-game. A congressional override of the Court's decision is not the "end" of the dialogue (Emenaker, 2013; Fisher, 1988). Rather, the new congressional language is apt to return to the Court, opening the pathway for a new round of Court interpretation. Indeed, prior work on the iterative nature of agenda-building on the Court provides initial evidence for this pathway (Baird, 2004, 2007, Rice, 2014). In all, the majority gains favorable framing for subsequent debate on the Court while accepting minimal increases in the probability of congressional review.

The viability of the legal development strategy rests on two relatively uncontroversial observations of judicial politics. First, invites may only marginally increase the probability of congressional reversal of Supreme Court policy decisions. Consider the statistics reported by Hausegger and Baum (1999), who found that 7.5% of statutory decisions without invitations are overridden by Congress compared with 14.8% of statutory decisions with invitations. Thus, the invite itself only increases the percentage of statutory cases overridden by, at least in their analysis, about 7%, with the vast majority of statutory decisions unlikely to be overridden.

From the *ruling regime* and *cross-purposes* views, the marginal increases are theoretically troublesome. In both cases, the strategy is premised on

congressional response happening; indeed, Spiller and Tiller (1996) note invitations are only valuable when a policy is not "politically sustainable" and thus Congress must take action. Conversely, from the *legal development* perspective, the marginal increases in the probability of congressional attention to a Supreme Court invitation is intuitive. In this view, justices are willing to accept marginal increases in the probability of congressional attention to forestall potentially negative judicial attention. Moreover, the Court—even in the presence of the invite—may further limit the probability of congressional attention by setting policy close to the congressional indifference point. This is particularly important, as subsequent judicial attention—whether in lower courts or at the Supreme Court—is likely for policies that reach the Court (Baird, 2007, Pacelle, 1995, Rice, 2014).

Second, the *legal development* view also rests on the observation that the legal rules outlined in the decisions of the Court structure future decisions. Recent research has forcefully asserted and found evidence in support of this argument (e.g., Friedman, 2006; Kastellec, 2010; Kastellec & Lax, 2008; Richards & Kritzer, 2002; Wahlbeck, 1997). On the respective policy, the invite signals that revision of the Court's policy decision is most appropriately pursued through another institution. Litigants and justices interested in securing change on the policy through the courts are thus additionally tasked with answering a principle stipulating that the Court is *not* the proper institution to revisit the conflict. Thus, justices in the majority are—contrary to the *cross-purposes* hypothesis—able to secure both their policy and legal rule preferences in exchange for a marginal increase in the probability of congressional attention.

In all, the invitation carries relatively minor costs—an increase of a few percent in terms of congressional reversal rates—in exchange for favorably framed subsequent debates both at the Supreme Court and in lower courts. The primary observable implication, from the legal development perspective, is that invitations should occur most frequently where the Court is deeply divided. When the majority anticipates future attention to and divisions upon similar or related policies, there exists an equilibria where the (minor) costs of additional congressional attention are surpassed by the utility of a beneficially framed debate. Conversely, if the majority anticipates favorable policy outcomes on subsequent cases, there is little to no use for accepting additional congressional scrutiny. Incurring the costs of creating a more favorable playing field makes little sense when everyone—or most of everyone—is on the same side. Where the Court is maximally divided—cases with a minimum winning coalition—the majority should be most likely to include an invitation for congressional attention to favorably structure future Court debates.

Moreover, it follows from the above that—contrary to the *cross-purposes* and *ruling regime* hypotheses— policy preferences should if anything be *more* directly predictive of outcomes in decisions with an invitation, as the potential cost of congressional attention is acceptable in exchange for entrenching and securing the majority's preferences in future cases. To consider again the strategy of the majority, an invitation makes sense when the costs of additional oversight are acceptable to favorably frame subsequent cases; such a strategy is particularly useful if one is deciding consistent with their policy preferences, but counterintuitive where they are deciding against their policy preferences. On the contrary, both the *cross-purposes* and *ruling regime* hypotheses posit that the majority set policy against their preferences in expectation that Congress would update the policy upon invitation.

Thus, the *ruling regime, cross-purposes*, and *legal development* hypotheses offer separate narratives and associated testable implications for the process underlying invitations for congressional attention to the decisions of the Supreme Court. The *ruling regime* hypothesis suggests that as the ideological distance between the Court and Congress closes, the Court should offer more invitations, and the policy outcomes of those decisions should be less predictable based on the majority's ideological preferences. The *cross-purposes* hypothesis proposes that justice disagreement with the policy outcome of the decision should increase the probability of invitations for congressional attention, and likewise suggests justice's ex ante ideological preferences are less predictive of voting outcomes in majority decisions with invitations. Finally, the *legal development* hypothesis proffers invitations arise primarily based on their utility to the majority through legal development, with voting divisions on the Court precipitating increases in the presence of invitations, and votes in cases with invitations being most directly predictable based on ideological preferences. In what follows, I turn to assessing these views.

Data

Testing the factors precipitating invitations in majority opinions requires extensive and comprehensive data on their occurrence and prevalence. Data collection for this type of study presents the prospect of massive resource and time costs. Consider the problem. Each invitation is a short phrase in a lengthy document, which itself is part of a massive corpus. Given this, identifying each individual invitation statement is exceedingly expensive and wildly inefficient. Through computational approaches to text analysis, I overcome these high costs and inefficiencies and assemble a new and comprehensive data set of Supreme Court invitations to Congress for all opinion types across an extended period of time. With this expanded data, I am better able to examine the multitude of theoretical motivations for invitations.

I identified invitations through the following process. To start, I collected the texts of all Supreme Court opinions from 1946 through 2011. I then split the files into sentence-level data using Stanford CoreNLP (Manning et al., 2014) and retained only sentences featuring "congress*" or "legis*" string matches. In doing so, I markedly decrease the number of observations which require classification. Following D'Orazio, Landis, Palmer, and Schrodt (2014), I utilize supervised machine learning to rule out extremely unlikely observations, thus vastly simplifying the task of human coding. It is imperative to note that the classifier is used only to rule out very unlikely observations, with all coding of the remaining sentences then done by hand.[5] From a total of 94,758 sentence matches, I randomly sampled 2,000 sentences. These were then coded for whether or not there was an invitation to Congress to address the Court's decision.[6] In this initial sample of 2,000, 86 sentences were classified as invitations to Congress.

Treating the sentence-level texts as data, I then trained a classifier to identify invitations in the sentences. To do so, I relied on the linguistic structure and conventions of the Court. I converted the sentences to a document-term matrix of sentence-level bigrams ("Congress may") and trigrams ("Congress may respond"). Here, each observation is a sentence, with variables being counts of the bigrams and trigrams appearing in that sentence. I split the data into training and testing subsets, then trained a conditional inference trees classifier to classify the remaining sentences. I tuned the tree to inflate false positives, then manually coded the identified sentences by hand. After hand-coding of the identified subset, I then trained yet another new classifier with the original coded sample as well as the coded sample from the first run of the classifier. I again split the hand-coded data into training and testing subsets. On this run, I retained bigrams, trigrams, and four-grams. I trained a random forest classifier with 5,000 trees and with the partitions stratified to ensure balance across the imbalanced subsets. With the additional information, the classifier correctly classified 84.3% of sentences within the training set, though that figure is inflated by the imbalance in the data. Of just invitation sentences, the classifier correctly identified 74.3% within sample. In the test set, the classifier correctly identified 85.7% of all sentences, and 85% of invitation sentences.[7] Because the classifier incorrectly identified 14% of sentences as invitations, I did a final manual coding pass through the classified sentences to remove noninvitations.

In total, I identified 430 invitations in Supreme Court opinions within the 65 years of data under study. The mean number of invitations during a term is 6.4, with that number ranging from a high of 16 during 1972 to a low of 0 during two terms (1990, 2011). In Figure 1, I plot the proportion of cases with an invite for congressional response from 1946 through 2011. I plot the proportion of cases with an invite rather than the raw numbers because the

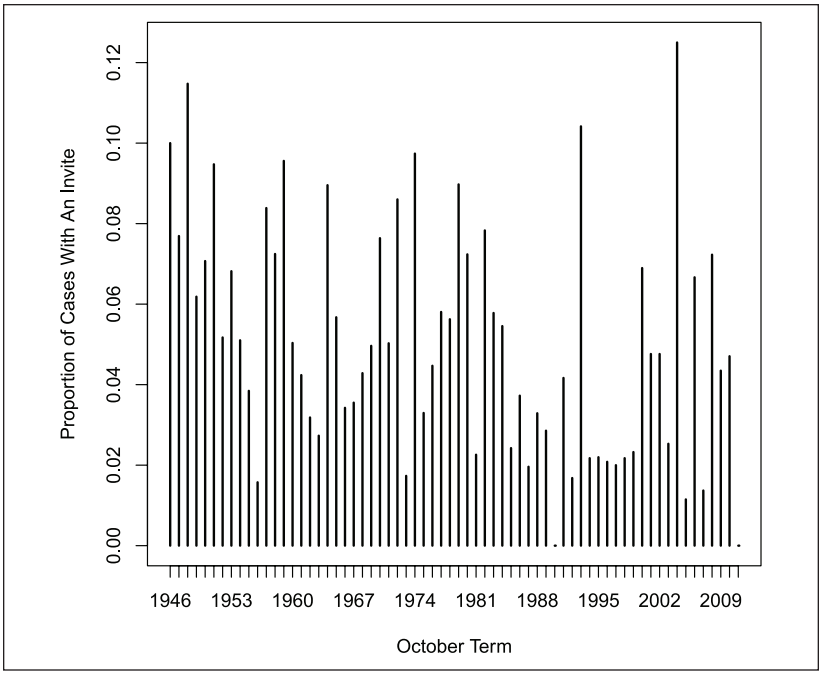

Figure 1. Congressional invitations over time.

change in the Court's workload over the time period under study necessarily corresponded with a decrease in the number of invitations. As is evident in the figure, the *rate* of inviting congressional action barely shifted. During this time frame, a member of the Court issued an invitation in approximately 5% of cases each term.

Statutory Versus Constitutional Interpretation

A series of studies (e.g., Dahl, 1957; Emenaker, 2013; Ignagni & Meernik, 1994) have noted that congressional overrides of the Court's constitutional decisions occur at greater rates than congressional overrides of the Court's statutory interpretation decisions. Yet though invitations for congressional attention occur in both statutory interpretation and constitutional interpretation decisions, they are much less frequent in constitutional interpretation decisions Indeed, the rarity of invitations—with just 31 constitutional interpretation opinions featuring an invite across 66 years of data under examination—cautions against drawing strong conclusions on their usage and utility.

To that end, the analyses to follow all focus on statutory interpretation decisions alone.[8]

Before doing so, though, it is worth observing that the decrease in frequency in areas where overrides are more likely is entirely consistent with the *legal development* hypothesis, while again counter to the empirical expectations for the *cross-purposes* and *ruling regime* hypotheses. Both *cross-purposes* and *ruling regime* hypotheses hold the utility of invites is positively linked to the probability of congressional response; therefore, we would expect an increase in the issuance of invites where Congress was likely to respond. For the *legal development* hypothesis, the implication of an increase in congressional overrides is that justices should be more concerned of heightened attention and potential overrides. If that is indeed the case, invites should be substantially less frequent. This is precisely what we observe as the majority issues invites at significantly lower rates in constitutional interpretation cases, with invites in just 1.2% of all constitutional interpretation opinions as compared with invites appearing in 3.7% of statutory interpretation opinions. Thus, the discrepancy in the rates of invitations across statutory and constitutional interpretation decisions, in conjunction with recent research documenting the prevalence of congressional overrides of the Court's constitutional interpretation decisions (e.g., Emenaker, 2013), offers initial evidence supportive of the *legal development* hypothesis.

The Influence of Invitations

Before proceeding to a series of robust empirical examinations of the different hypotheses, I first evaluate a necessary condition of the legal development hypothesis. For the legal development perspective to hold, invitations can only marginally increase the probability of congressional reversals; if invitations are instead associated with high rates of congressional reversal, it would offer evidence to support the utility of the invite strategy from the ruling regime and cross-purposes perspectives.

Prior research offers mixed evidence as to how meaningful the invitations are in engendering congressional responses (Hausegger & Baum, 1999; Ignagni, Meernik, & King, 1998), with disparate findings largely a function of different definitions of response (congressional hearings, bills introduced, or bills passed) and time frames (within 1 year, within 5 years, etc.). I focus here on decisions which are overridden by an act of Congress within 5 years, as those are most relevant to the perspectives under consideration. Each theory is attentive to policy outcomes relative to the invite and thus requires measuring direct policy influence in the form of bill passage.

To measure statutory overrides, I utilize two separate data sets. First, I include data from Eskridge (1991a) and updated by Hasen (2013) that covers

1967 through 2012. Both Eskridge and Hasen scanned the committee report summaries of the United States Code Congressional and Administrative News (USCCAN) and supplemented with additional materials. In all, they identify 146 overrides of Supreme Court statutory decisions.[9] Second, as a function of the ongoing debate as to how best to code overrides (Widiss, 2014), I also utilize overrides as coded by Eskridge and Christiansen (2014). These data are more inclusive and feature significantly more instances of Congress overriding Court decisions.

With more extensive data on invitations than any prior study, and the availability of updated data on congressional responses to Supreme Court decisions, I turn now to assessing the relationship between invitations and subsequent congressional overrides. I begin with the Hasen (2013) data. Take first legislative overrides of Court decisions occurring at any point after the Court's decision. In cases without an invitation, 1.8% of Court interpretations are overridden by legislative action, compared with 4.9% of Court interpretations when there is an invitation. This difference, an increase of approximately 3%, is statistically significant ($p = .03$) in a Welch's two-sample t test, but the magnitude of the effect is minimal ($p = 0.03$). Moving to an analysis of overrides as coded by Eskridge and Christiansen (2014), the difference disappears all together. Here, statutory overrides occur in 5.4% of cases without an invitation, compared with 5% of cases with an invitation. Thus, where scholars have more aggressively classified congressional actions as overriding the Court, any effect disappears.

In both cases, the overwhelming majority of statutory interpretation decisions are unlikely to be overridden by act of Congress. The pattern is consistent with the observed patterns of overrides in Hausegger and Baum (1999) and indicates the "politically unsustainable" policy decisions central to the *cross-purposes* and *ruling regime* hypotheses are rare. This is particularly interesting in light of the ongoing debate surrounding the status of institutional "dialogues" (Emenaker, 2013; Fisher, 1988; Hasen, 2013). The evidence presented here suggests the Court's invitations—while ostensibly signaling an effort at statutory dialogue—do little to furnish a reaction in terms of policy outcomes. Furthermore, the observed dynamic is consistent with and further supports the *legal development* hypothesis, as the absence of any difference suggests the justices can include the invitations at little cost. On the contrary, the absence of an effect here runs counter to expectations from the *cross-purposes* and *ruling regime* hypotheses. In both cases, the Court's invitations receive no additional attention, suggesting the overwhelming majority of policy outcomes in cases with invitations will persist counter to the majority's preferences.

Research Design

I turn to specifying a model of judicial invitations for congressional action. To assess the *legal development* perspective, recall that this perspective suggests invitations arise according to their value in structuring legal development favorably, ensuring more optimal policy outcomes going forward. Thus, when the Court is most divided on a particular policy, the utility of the invite is greatest. This follows as for the relevant justice the invite may be used to declare particular areas of interpretation out-of-bounds or more appropriately resolved by other institutions, setting in place a principle to guide future iterations of Court interpretation. To measure division on the Court, I include an indicator variable for a *minimum winning coalition*.[10] If the legal development hypothesis is correct, I expect that in cases where the Court is maximally divided, the probability of observing an invite should be correspondingly higher.

To assess the *ruling regime* hypothesis, I include variables accounting for the ideological compatibility between the author or opinion coalition and the contemporaneous Congress. For a majority who is part of the ruling regime, invitations offer an opportunity to avoid controversial decisions while allowing ideologically friendly Congress to address the underlying policy. The implication is that decreases in ideological distance between the majority and Congress should be associated with increases in the probability of an invitation. This calculus is complicated when considering who exercises control of opinion content and thus the inclusion of the invite, with some arguing the opinion author is chiefly responsible (e.g., Maltzman, Spriggs, & Wahlbeck, 2000) while more recent work suggests the median of the majority exercises control (Carrubba, Friedman, Martin, & Vanberg, 2012). To account for both potential avenues of influence, and in accordance with prior work, I calculate measures at both levels. I use Bailey (2007) scores to calculate the ideological distance between the relevant member of the majority coalition (author or median) and the medians of the House and the Senate. For both measures, I average across House and Senate ideological distances, yielding a measure of *author distance to Congress* and *coalition median distance to Congress*.

The *cross-purposes* hypothesis holds that invitations are a function of a conflict between justice's legal rule preferences and their policy outcome preferences; when faced with this conflict, justices choose the long-run payoff of the legal rule while inviting Congress to address the deficient policy outcome. As noted above and in prior research (e.g., Hausegger & Baum, 1999; Spiller & Tiller, 1996), the implication of the *cross-purposes* hypothesis is that invitations should be more frequent in cases where the justice's ideological preferences are opposite of the ideological direction of the Court's disposition; that is, instances where the justice appears ex ante to disagree

with the policy outcome of the case. Again I calculate measures at both opinion author and opinion median levels. The first, *author disagreement*, is a measure of the author's ideology relative to the ideological content of the opinion. I measure author ideology using Bailey (2007) scores, and opinion ideology using the ideological direction variable—which is measured precisely on the basis of policy outcome—in the Supreme Court Database (Spaeth, 2011). I consider author disagreement as the absolute value of the justice's term-specific Bailey score when the justice's ideology score is liberal (conservative) and the direction of the decision is conservative (liberal), and the negative of the absolute value when the ideology score and direction are consistent. Thus, the measure captures explicitly what prior researchers sought to capture. Likewise, I measure *coalition disagreement* by the same methods, but instead compute disagreement based on the Bailey score of the median of the majority coalition given their potential control of opinion content (Carrubba et al., 2012).[11]

To fully assess the *ruling regime* and *cross-purposes* hypothesis, I include a separate model accounting for potential interactions. Because the effect of policy disagreement is potentially conditioned by the ideological proximity of the member of the Court to Congress, I include interactions for both disagreement variables with the respective distance variables. If the influence of policy disagreement is conditional on ideological compatibility, the effect of disagreement should decrease as the value of distance increases.

In addition to the above, I include a series of control variables. Beyond policy outcomes, and following prior work in the area (e.g., Hausegger & Baum, 1999) as well as recent work on justice attention to the potential of negative feedback from external actors, one may also believe that justices are concerned with criticism of their opinions. The more likely the justice believes criticism to be, the more likely they may be to adjust their behavior, whether in voting (Clark, 2009) or in opinion drafting (Owens et al., 2013). One avenue to limiting that criticism would be to expressly open the possibility of congressional response in the opinion to ameliorate potentially negative institutional legitimacy consequences for decisions counter to the preferences of organized interests or the public. Following Hausegger and Baum (1999), I measure the potential negative response as the total number of amicus briefs in the case. Note, however, that the total may mask important variation in the number of losing groups in the Court's decision, of which the reaction may be particularly negative. Therefore, to capture the number of potentially affected losing groups, I also include the net number of amicus briefs on the losing side of the case.[12] Again using data from Collins (2007; 2008), I measure this as the number of amicus briefs receiving an unfavorable disposition minus the number of amicus briefs receiving a favorable

disposition. The measure takes on values between –20 and 16, with lower numbers indicating that more amicus briefs received a favorable disposition, while higher numbers indicate that more amicus briefs were on the losing side of the case.[13]

Furthermore, some cases and the respective policy outcomes and legal rules are more important to the justices than others. For justices who do not have strong feelings on a particular issue, the prospect of inviting congressional action to resolve that issue may be more appealing than for the justice who has strong opinions. To address this, I include the Clark, Lax, and Rice (2014) measure of predecision salience, which is based on a Bayesian latent variable model of media coverage across three major national newspapers over an extended period of time *prior* to the decision in the case. Finally, I include fixed effects for the major issue areas in the Supreme Court Database to account for heterogeneity in the relationships across issues, as some areas may be more likely to be addressed than others (i.e., civil rights as opposed to questions over federal court jurisdiction). In the interest of space and clarity of presentation, I do not include the issue area fixed effects estimates in the reported results below.[14]

Analysis

I estimate two separate logistic regression models for the presence of an invite in a majority opinion in a statutory interpretation opinion, with separate models with and without interaction terms between ideological measures for the majority and ideological distance to Congress covariates.[15] Due to the availability of data for the control variables, the analysis is restricted to the 1955 through 2001 terms. I present the results in Table 1.

Starting with the control variables, none of the standard explanatory variables for models of invitations for congressional attention offers significant explanatory power; across both measures of group participation and the measure of predecision political salience, there is little evidence of a systematic relationship with the presence of an invite in the majority opinion. The *ruling regime* hypothesis receives little support, as author distance to Congress is negative, quite small, and does not approach statistical significance, while median distance to Congress is positive (opposite the hypothesized direction) and does not approach statistical significance. Moving then to the *cross-purposes* hypothesis, neither author disagreement nor coalition median disagreement are systematically related to invite behavior; for both, the coefficients fail to reach standard levels of statistical significance whether considered across in the standard model (columns 2 and 3) or after adjusting for the relevant justice's ideological distance to Congress (columns 4 and 5).

Table 1. Models of Invitations for Congressional Action, 1955-2001.

Variable	No interactions	*p* value	Interactions	*p* value
(Intercept)	–3.55 (0.39)	<.01	–3.53 (0.40)	<.01
Net amicus curiae	–0.05 (0.05)	.40	–0.05 (0.05)	.39
Losing amicus curiae	0.08 (0.06)	.24	0.08 (0.06)	.23
Predecision salience	–0.06 (0.19)	.75	–0.06 (0.19)	.75
Disagree author	–0.08 (0.12)	.50	0.06 (0.30)	.85
Disagree coalition median	0.22 (0.20)	.29	0.17 (0.49)	.73
Minimum winning coalition	0.48 (0.26)	.06	0.49 (0.26)	.06
Distance: author to congress	–0.05 (0.19)	.78	–0.08 (0.27)	.85
Distance: median to congress	0.37 (0.28)	.19	0.37 (0.30)	.22
Author Disagree × Distance	—	—	–0.10 (0.20)	.62
Median Disagree × Distance	—	—	0.06 (0.43)	.89
Issue area FEs	YES		YES	
N	2,559		2,559	

Note. Dependent variable in these analyses is whether the majority opinion included an invite for congressional action. P-values are based on two-tailed significance tests. FE = Fixed effects.

Furthermore, there is little to indicate ideological compatibility with the contemporaneous Congress exerts any statistically significant effect on invitations, nor that distance conditions the influence of policy disagreement in a systematic manner.[16] In all, whether in models accounting for the ideological distance between the relevant member of the Court and Congress or in models excluding that consideration, there is no significant evidence indicating policy disagreement or ideological distance to Congress systematically influences the inclusion of invitations for congressional attention.

The lack of empirical support for the *ruling regime* and *cross-purposes* hypotheses is largely compatible with the low probability of Congress actually resolving the deleterious policy outcome in favor of the inviting justice's preferences. Therefore, I turn next to the *legal development* hypothesis. On this, the results in Table 1 provide consistent evidence across specifications of the association between minimum winning coalitions and invitations to Congress. There is a strong and positive relationship between minimum winning coalitions in a case and the issuance of an invite for congressional attention. Moreover, this effect persists across both specifications here, as well as variety of alternative specifications.[17] To demonstrate the marginal effects of the voting division, I include in Figure 2 plots of the predicted probability of an invite in cases with a greater than minimum winning coalition and a minimum winning coalition in models of invitations in both all opinions (left panel) and in only opinions dealing with statutory interpretation (right panel).

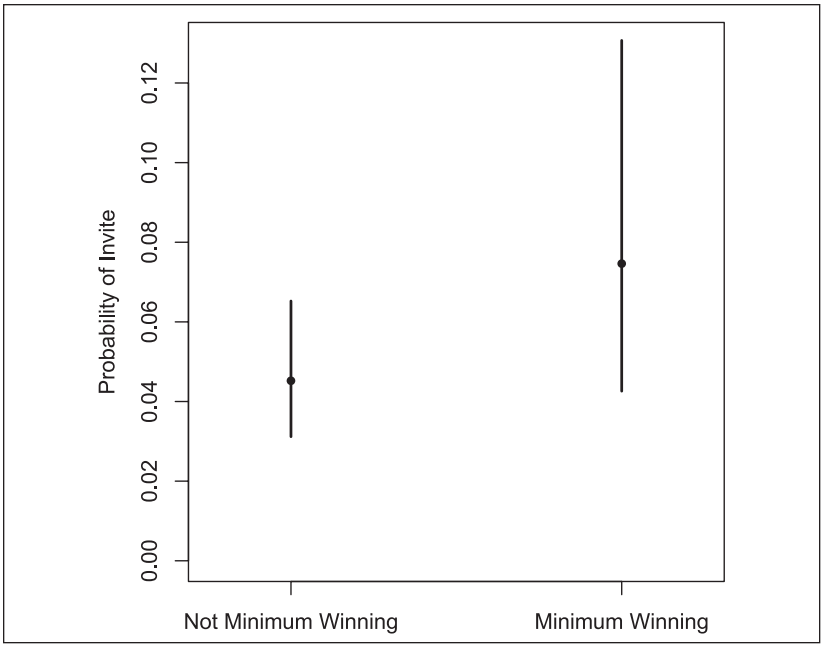

Figure 2. Predicted probabilities of invitation.
Note. These plots provide predicted probabilities of an invite for congressional attention in a majority opinion (y-axis) for minimum and nonminimum winning coalitions in statutory interpretation decisions.

The predicted probabilities are calculated with all other variables held at their mean or model values. All else equal, across both models opinions in decisions with a minimum winning coalition are nearly twice as likely on average to include an invitation to Congress as other decisions of the Court.

As Hausegger and Baum state, the majority may have a host of motivations in reaching their decision to include an invitation to Congress, including a concern with achieving both good law and good policy. In the above, I find robust evidence supporting a novel theory of judicial motivation for invitations, the strategic value of invitations to Congress as a tool in shaping and constraining legal development. For justices in the majority of a Court divided, I have argued the goals of favorable policy and legal rule outcomes may both be furthered by invitations to Congress. Establishing a legal principle for a particular policy that Congress is the proper institution for rectifying the Court's decision on that particular policy embeds in the law a barrier for future courts, and does so for a fractional increase in the probability of

congressional reversal. In the remainder of this paper, I examine two separate corroborative hypotheses which offer further evidence in support of the *legal development* hypothesis.

Corroborative Analysis: Ideology and Invitations

The *cross-purposes* hypothesis holds that—when policy outcome and legal rule preferences diverge—justices may "follow the law as they see it while asking Congress to supplant their choice with good policy as they see it" (p. 182). Likewise, the *ruling regime* hypothesis holds that the majority, when it is ideologically compatible with Congress, can leave potentially controversial policy decisions to their ideologically friendly allies in Congress. Empirically, this suggests cases with invitations are instances where justices are constrained—whether by the legal rule or by their institutional situation—and thus vote against their policy preferences. Considering the vote of the justice, the argument logically holds that ideological preferences should be *less* predictive of voting outcomes in cases with invitations.[18] Opposite this perspective, the *legal development* perspective suggests justice policy preferences should be equally if not more predictive of case outcomes between decisions with and without invitations; the invitations are used as a tool for favorably structuring legal development toward the majority's preferred policy outcomes. Thus, analyzing differences in the predictability of justice votes as a function of the justice's ideological preferences offers an additional avenue to test the perspectives.

While prior studies were limited—due to the rarity of invitations and the short periods under examination—to small samples that precluded separate analyses of cases with and without invitations, the extensive period of the Court's history covered in this analysis provides ample leverage to examine differences across the subsets. Specifically, we have 956 justice votes in statutory interpretation cases featuring an invite. I therefore turn to specifying a model of justice voting behavior. The dependent variable in these analyses is whether the justice voted in the liberal direction, as coded in the Supreme Court Database (Spaeth, 2011). Given the dichotomous dependent variable, I estimate logistic regression equations, specifying separate models for cases with and without invitations; if justices are constrained in cases with invitations, the influence of their ideological preferences on their voting behavior should be mitigated. I measure justice ideology using Bailey's common-space estimates of judicial preferences (2007).[19] Larger values indicate more conservative justices, while smaller values indicate more liberal justices.

Prior research indicates the influence of ideology on voting behavior is exacerbated in politically salient cases (Unah & Hancock 2006), therefore I

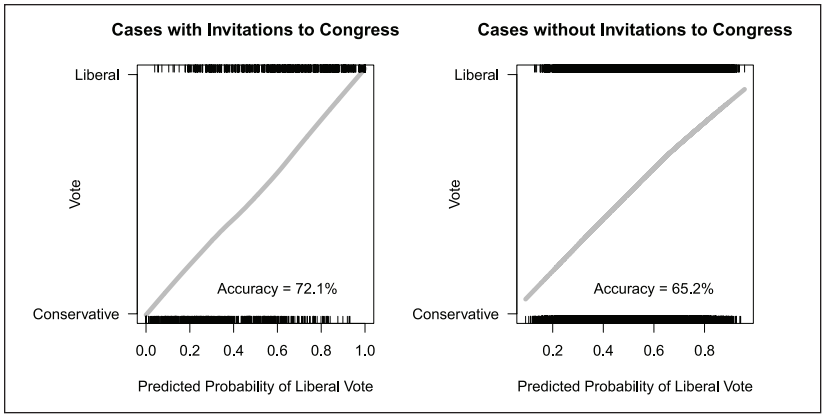

Figure 3. Predicted Probabilities and Votes.
Note. These plots provide predicted probabilities of a liberal vote (*x*-axis) against the justice's actual vote (*y*-axis) in cases with invitations (left panel) and without invitations (right panel).

include a variable accounting for the political salience of the case and an interaction term between salience and ideology. To measure political salience, I again utilize Clark, Lax and Rice's pre-decision measure of salience. Because the Court reverses in approximately two-thirds of cases (McGuire, Vanberg, Smith, & Caldeira, 2009), I also include the disposition in the lower court, expecting that cases with liberal dispositions in lower courts are more likely to be decided in a conservative fashion by the Supreme Court. Finally, I include issue area fixed effects in order to account for unobserved heterogeneity as a function of temporal shifts in Supreme Court agenda attention.

In the interest of space, the full results appear in the online appendix. The relationship is made clear, though, in Figure 3. There, I demonstrate the similarity of ideological voting across cases with and without invitations by presenting the predicted probability of a liberal vote against the actual vote for cases with (left panel) and without (right panel) invitations for all opinions (top row) and statutory interpretation opinions (bottom row). The gray lines indicate a lowess curve fit to the data. As is immediately evident, the results are consistent across subsets of the data; in both cases with and without invitations, ideology exerts a strong and consistent influence on the voting behavior of justices. While unsurprising as a general rule, the influence of ideology in cases with invitations is inconsistent with the ruling regime and cross-purpose stories of the causal process underlying invitations. While prior work has generally explained invitations as arising from constrained justices voting against their policy preferences, the results here provide initial evidence

the voting behavior is entirely consistent with the justice's ideological preferences.

In fact, ideological voting is marginally *more* predictive in cases with invitations than cases without. Approximately 72% of votes in cases with invitations are predicted correctly, while 65% of votes in cases without invitations are predicted correctly. This bears emphasis as it is exactly what would be expected from the legal development perspective. In cases with invitations—where the Court is divided and the justices seek to use the invitations as a tool to structure debate over the policy going forward—ideologically motivated justices can and do follow their policy preferences. In all, there is little support here for the presence of a legal constraint inhibiting ideological voting. On the contrary, the results are strongly consistent with a *legal development* perspective in which the majority accepts the minor costs of issuing an invite to favorably structure the path of the law.

Corroborative Analysis: Jurisprudential Influence

Finally, the *legal development* perspective relies on the notion that the invite has some long-term strategic benefit to the majority. Accepting the costs of inviting congressional attention on the specific policy outcome (the increased potential of congressional reversal) requires that the justices both expect future discussions of similar or related policies—such that the dissenting votes may try to revisit the policy disposed in the instant case—and likewise that the invitation carries some benefits in structuring debate in those subsequent cases. Therefore, from the *legal development* perspective, we should observe cases with invitations having greater jurisprudential staying power than cases without invitations.[20]

As above, the extensive data collected on invitations permit a broader analysis of invitations, here the relative attention such cases engender from future courts compared to cases without invitations. I turn now to a model of jurisprudential influence. To measure influence, I use the number of times a case is cited by future Supreme Court cases (Fowler & Jeon, 2008). Citations provide a direct indication that a relevant policy has returned to the Court, a necessary condition for the viability of the majority's strategy under the *legal development* hypothesis. Moreover, increases in citations indicate the continued relevance (if not treatment) of the precedent, suggesting increased staying power.[21] Note this is not to say the precise policy has returned, but rather that a related policy for which citation to the opinion with an invitation is appropriate.

Because the dependent variable is a count, I estimate negative binomial regressions. As before, I estimate separate models for both all opinions and opinions only dealing with statutory interpretation. In addition to the

presence of an invite, I include a series of additional covariates capturing characteristics of the Court's opinion likely to influence subsequent citations. First, more important decisions are likely to be cited more frequently by subsequent courts. I therefore include the Clark, Lax, and Rice measure of salience, this time including coverage of the decision in the estimation of salience. Relatedly, I include a dichotomous measure to indicate if the opinion altered precedent, as those opinions are likely to be of greater attention to future courts. Conversely, and third, I include a measure of whether or not the decision of the Court was later overridden. Fourth, I include the number of dissenting votes, as dissents are typically associated with longer opinions (Epstein, Landes, & Posner, 2011) and additional topics (Rice, 2017), both of which could yield relatively higher citation counts. Finally, I include a cubic polynomial for the age of the case, as older cases are likely to have higher citation counts but nonmonotonically after the passage of some time.

I highlight here the results for the primary covariate of interest, the presence of an invitation to Congress in the majority opinion. The full model results are again included in the appendix. Across models, I find strong and consistent evidence that the presence of an invite is associated with a substantial increase in the number of future citations. To illustrate the effects, in Figure 4 I plot differences in the predicted number of citations across cases with and without invitations for all opinions (left panel) and only those cases dealing with statutory interpretation (right panel). In both, there is a demonstrable increase—approximately five citations on average—in the number of subsequent cases which cite the opinion of the Court. Invitations in majority opinions are associated with higher levels of subsequent Supreme Court attention, precisely as the *legal development* perspective would argue.

Discussion and Conclusion

This study significantly extends prior work on the relationship between Congress and the Supreme Court, and the strategy of Supreme Court justices within that framework. In combination with the introduction of an original data set of Supreme Court invitations to Congress, I develop and test a new perspective—based on a growing literature on legal development—which understands invitations as a tool for structuring *legal development* in a manner favorable to the policy preferences of vulnerable majorities. By placing the onus for different interpretations on Congress, the majority is able to strengthen the codification of their preferences in the law in exchange for a very minor increase in the probability of congressional attention. Both in the primary analyses and in corroborative analyses, I find strong support for the influence of legal development motivations on majority decisions to include invitations

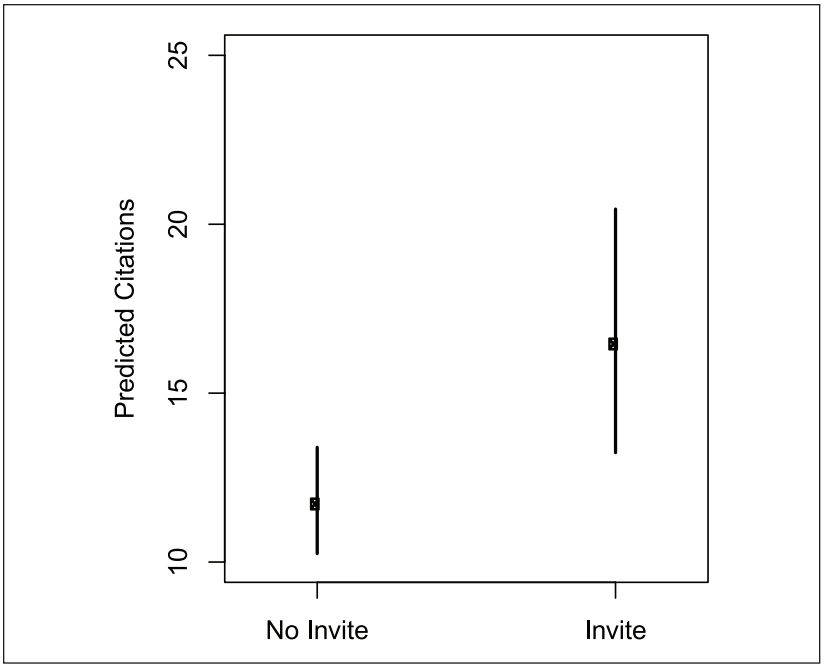

Figure 4. Predicted citations for opinions with and without invitations to Congress.
Note. These plots provide the predicted number of citations (*y*-axis) to an opinion with and without invitations, holding all other covariates constant.

in the opinion of the Court. Taken together, by considering the utility of invitations beyond the specific case and policy for which the invite was issued, this study arrives at an understanding of Supreme Court invitations to Congress that sheds important new light on studies of judicial behavior, legal development, cross-institutional interactions, and the policy process.

Beyond this contribution, the research here also provides important new understandings of the ongoing dialogues between the Court and Congress over statutory and constitutional interpretation. In the area of constitutional interpretation, where the Court's interpretations are more likely to face congressional scrutiny, the Court retreats from dialogue, issuing fewer invitations for congressional attention. Conversely, on statutory interpretation cases, where the Court's interpretations are less likely to face congressional scrutiny, the Court more frequently encourages Congress to examine the majority's interpretation. The majority, in other words, strategically engages or avoids

dialogue. Given the recent debate over the status of constitutional and statutory dialogues (e.g., Hasen, 2013), the research has important implications for understanding the mechanisms—expectations of congressional review and divisions on the Court, in particular—in understanding how the Court engages. Congressional inattention to invitations becomes a tool for the justice interested in securing their policy preferences in the law; by voting their preferences and declaring that only Congress can rightfully rectify the decision, the justice precludes future Courts or lower courts from significantly modifying their preferences. Given the contemporary "do-nothing Congress"[22] and political polarization, the ability to utilize invitations strategically becomes a yet more valuable tool, while a fractured Congress is unable to reply.

Still, this research is only a first step toward understanding these explicit interactions between institutions. Future research can and should address a number of subsequent issues. First, work remains to be done in considering the character of the invitations. Having now identified the invitations, the task is vastly simplified for subsequent work. In the above, I have not explored variations in the probability of success for individual invitations. Some invitations, however, may be exceedingly unlikely to ever be addressed. Capturing this variation, and a host of other characteristics of precisely what the invite entails, deserves further work. Second, future work should seek to build on the research here to identify the influence of inviting congressional attention on precedent vitality. While difficult to disentangle causally—particularly given the voting divisions, cases with invitations may be ex ante less likely to have high precedent vitality—it would be useful as an additional corroborative exercise to identify whether or not the inclusion of an invite favorably structures subsequent decisions of the Court. One potential avenue would be an analysis of litigation flows into the federal courts before and after the invitations, as I have argued above the invite serves an additional function of constraining the utility of both the Supreme Court and lower courts as an arbiter of that particular area of policy. Finally, examining reactions to congressional interventions after the invitation permits further incorporating the iterative nature of policymaking and the ongoing dialogues between the Court and Congress. I leave this assessment to future research.

Author's Note

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Supplementary Material

Supplementary material is available for this article online.

Notes

1. Nina Totenberg, "Supreme Court: Congress Has To Fix Broken Voting Rights Act," *National Public Radio*, 25 June, 2013.
2. Because the average length between appointments has increased, it is also reasonable to suspect—under the ruling regime hypothesis—that the rate of invitations would concomitantly decrease as the Court is less likely to be ideologically aligned with Congress.
3. Note that the policy disagreement equilibria nicely characterizes the observed prevalence of Supreme Court invitations to Congress, as one would expect that only rarely would the justices legal rule and policy outcome preferences come into conflict in a single case (Spiller & Tiller, 1996).
4. The evidence is limited, however, in that the authors find no evidence that an opinion author who is ideologically distant from her preferred policy position is more likely to issue invitations. In later analyses, I explore both avenues.
5. The total word count of the sentence corpus is more than 2.6 million words, or the approximate length of Tolstoy's *War and Peace* (561,304 words) 4 times over. Thus, utilizing the approach of D'Orazio et al. (2014) and "separating the wheat from the chaff" is appropriate.
6. A research assistant and I coded these as strong, weak, or no invitations, following the coding procedures of Hausegger and Baum (1999). For purposes of the classifier, reducing this to a binary classification was found to offer substantial improvements in classification accuracy. In the first iteration described below, I binarize the classification to be whether or not there were any invitations. Doing so creates a bias in favor of classifying more cases as invitations. In the second iteration described below, I include only strong invitations, again consistent with Hausegger and Baum's approach.
7. The most important features for classification splits are included in the online appendix and offer additional evidence of the utility of the approach.
8. In the interest of full disclosure, the online appendix includes the results of all empirical analyses replicated with just the constitutional interpretation decisions. The results are consistent with the statutory interpretation results, and supportive

of the *legal development* hypothesis. Thus, the strategy persists across modes of interpretation, though the frequency with which the strategy is employed drops. Note, however, one specification offers preliminary support for the *cross-purposes* hypothesis, but as I detail in the appendix I believe the result should be interpreted with significant caution.

9. According to Hasen, eight decisions were overridden twice by Congress. On these occasions, I include only the earlier of the two overrides.
10. Note the results are robust to inclusion of the number of dissenting votes. See the appendix for details.
11. Note that results are consistent when using Martin–Quinn scores, which are highly correlated with the Bailey scores. Bailey scores are utilized for the common cross-institutional ideological space.
12. An alternative to this approach would be to measure public opinion for the policy area of each case. Yet such an approach has significant limitations making it less desirable than net amicus briefs for purposes of this study. First, as a result of the shortage of public opinion data across the breadth of issues, let alone cases, the measure would result in significantly shrinking the scope of the analysis. Second, and following on the first point, the net amicus curiae measure is at the case level, which public opinion measures cannot capture. The public opinion measures are therefore a much coarser measure than net amicus curiae. Finally, while research has convincingly demonstrated that justices are aware of and utilize amicus briefs (Caldeira & Wright, 1990; Collins, 2004; Hansford, 2004; Spriggs & Wahlbeck, 1997), evidence for the influence of public opinion has been mixed and unable to differentiate whether the influence arises from the justices awareness of public opinion, or simply the fact that justices are members of the public themselves (Epstein & Martin, 2010).
13. Due to possible concerns over multicollinearity of these variables, I include in the appendix a specification without total amicus curiae; the results are substantively identical.
14. This specification choice necessitated that I drop from the analyses three extremely infrequent issue areas: attorneys, interstate relations, and miscellaneous cases. Note that the results are robust to the exclusion of fixed effects.
15. The results are robust to estimation through Firth's (1993) penalized likelihood method, which helps to account for the rarity of the event. A series of additional specifications are also included in the appendix.
16. To address concerns over multicollinearity, I include in the appendix models with exclusively author-based measures and exclusively coalition-based measures. The results of these simplified models are consistent with those reported here.
17. A series of alternative specifications are included in the appendix, each of which supports the *legal development* hypothesis.
18. Note that the logic here is similar to that of McGuire, Vanberg, Smith, and Caldeira (2009).
19. Results are consistent when using Martin–Quinn (2002) estimates of judicial ideology.

20. I thank an anonymous reviewer for this suggestion.
21. The alternative measure of jurisprudential influence—precedent vitality—presents a difficult causal conundrum and is less theoretically connected to the *legal development* hypothesis. Specifically, theory suggests the invitations are present in cases where the Court's division on a policy is greatest, and thus the precedential value is most vulnerable (hence the invite). A ratio of positive to negative treatments would thus mask important volume effects while also introducing problematic causal processes.
22. Aaron Blake, "The 'do-nothing Congress' graduates to the 'do-nothing-much Congress,'" *The Washington Post: The Fix Blog*, 20 December, 2016.

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