

Constraints and Conservatism: The Effect of Presidential Choices on Voting Patterns of Supreme Court Justices

Abstract

The decisions of the Supreme Court are constantly featured in news headlines with the accusation that the core institution of the judicial branch is completely politicized. In fact, justices are directly chosen by presidents who have clear political and constitutional agendas. But what about justices whose voting behavior and opinions seem less politically motivated than others? One major answer to that query may lie in the difference between constrained and unconstrained choices. When a president chooses a nominee based on political promises made or limitations imposed by other branches of government, that choice is constrained because those nominees must appeal to a broader political constituency and thus the selection pool is smaller. Among historical examples of constrained choices are Sandra Day O'Connor, Anthony Kennedy, and David Souter, all three of whom were instrumental in moderating the Court with their swing votes for the decades they were on the Court. In this paper, I explore the hypothesis that being a constrained choice makes a justice less faithful to their appointing president's constitutional agenda by quantitatively assessing voting records across their tenures on three main issues: abortion, affirmative action, and the Establishment Clause. Ultimately, my research shows that constrained choices do tend to follow their appointing presidents' agendas less faithfully and aggressively.

Keywords: constrained choice, voting patterns, Reagan, Bush, Supreme Court

In the summer of 1992, the United States was reeling from two shocking cases: *Planned Parenthood v. Casey*, the decision that preserved *Roe v. Wade* for another 30 years, and *Lee v. Weisman*, which held prayer at public school graduations to be unconstitutional. The outcomes of the cases were not shocking in themselves, but the coalitions of justices that produced these decisions presented a perplexing schism in the conservative voting bloc of the Court. In fact, on June 30th, 1992, the *Washington Post* reported that the “new controlling center-right bloc” composed of Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter, had “confounded conservative backers...and delighted liberals” in their surprisingly moderate voting patterns (Blackmun Papers Box 602). These confusing outcomes lead to my research question: what makes these justices behave differently than others?

I use the case study of the Reagan and Bush appointees to argue that justices who are nominated under certain political constraints will vote differently than justices nominated by the same president in unconstrained circumstances. The fact that O’Connor, Kennedy, and Souter were chosen to appeal to a wider constituency may explain why they also failed to accomplish their appointing president’s goals of overturning *Roe v. Wade* and ending constitutionalized abortion, overturning *Regents v. Bakke* and ending affirmative action programs, and overturning *Engel v. Vitale* and lowering the wall of separation between church and state (Simon 1995). Using a quantitative voting analysis, I explore the hypothesis that because these three were constrained choices, they will demonstrate less support for administration positions on constitutional social issues than their unconstrained counterparts in Rehnquist, Scalia, and Thomas.

Background and Research Methods

What is a constrained choice? For my research, I define a constrained choice as a justice nominated when a president, because of political promises or political factors like failure to get Senate approval, cannot necessarily appoint his first choice to the Court. Hence, the choice is constrained because the selection pool is smaller and the candidate must appeal to a wider political constituency. I focused on three constrained choices appointed by President Ronald Reagan and President George H.W. Bush. Sandra Day O'Connor was appointed to the Court as a result of Reagan's campaign promise to appoint the first woman to the Supreme Court in order to combat unpopularity with women in the polls (Cannon 1980). Anthony Kennedy was Reagan's third choice to fill the empty seat of Lewis Powell, a necessarily politically moderate choice in order to get a justice "confirmed quickly in a spirit of bipartisan cooperation" after two failed attempts to get a nominee through the Senate (Greenhouse 1987). Finally, President Bush made a similar moderate choice in David Souter, choosing to "steer[] the nomination clear of controversy" by choosing a nominee with no clear record for the Senate to pick apart and get borked—i.e., voted down (Berke 1990). Thus, each of these three justices were chosen by Reagan and Bush from a selection pool modified by certain political constraints.

To test my thesis, I examined 30 abortion cases, 14 affirmative action cases, and 49 Establishment Clause cases from 1972-2022 and assigned a quantitative value to each vote. My independent variable was whether or not the justice was constrained or unconstrained, and the dependent variable was the voting outcome score. Zero indicated a vote that substantially deviated from the appointing president's constitutional agenda, and one signified a vote that basically complied with that agenda. To compare how the constrained choices differed from unconstrained choices, I used a control group of three unconstrained choices appointed by the same presidents and repeated the process for them: William Rehnquist, Antonin Scalia, and

Clarence Thomas. I then averaged each justice’s voting scores to calculate an aggregate level of support for administration policies. A cumulative score closer to one shows that the justice voted most frequently to restrict the abortion right, limit affirmative action programs, or lower the wall of separation between church and state. A cumulative score closer to zero demonstrates that the justices voted more often to preserve the abortion right, supported affirmative action programs, or raise the wall of separation between church and state. After examining each issue area independently, I averaged the scores of each separate area to get overall scores and assess the justices collectively across all three issue areas. This method allowed me to objectively compare constrained and unconstrained choices to test if the two groups vote differently.

Findings

Abortion

The area of abortion offered the least discrepancy between constrained and unconstrained choices, with an average difference of 37.7% between the two sets of justices. **Figure 1** outlines the final scores for each justice in the area of abortion, with the lowest scoring justice in the constrained cohort (Souter at 43.0%) 57.1% lower than the highest scorers of the unconstrained cohort (Scalia and Thomas at 100% support rate). Of the unconstrained justices, Kennedy scored the highest with an 81.8% support rate of Reagan’s agenda on abortion; not shabby, but starkly contrasting from even the lowest scoring unconstrained justice, Rehnquist, with an overall support rate of 96.0%. Overall, the constrained justices boasted a score of 61.0% on the issue of abortion, which proved considerably lower than the average score of the three unconstrained justices at 98.7%. In

	TOTALS
Case	
Date	
<i>Constrained</i>	
O'Connor	0.5833
Kennedy	0.8182
Souter	0.4286
<i>Control</i>	
Rehnquist	0.9600
Scalia	1.0000
Thomas	1.0000

Fig. 1: Abortion

this area, Kennedy was by far the most supportive of administrative positions, with Souter and O'Connor both falling more generally around 50%. Still, none of the three constrained justices broke an 85% support rate for their appointing president's platform goal, and overall fell an average of 37.7% lower than the unconstrained justices in this issue area. As an effect of the deviations by the constrained justices, Reagan's agenda to overturn *Roe v. Wade* was effectively foiled for 50 years (data set assembled by author).

Affirmative Action

While affirmative action was the middle of the three issue areas in terms of average difference between constrained and unconstrained choices, this area boasted the largest difference between the lowest scoring constrained justice and highest scoring unconstrained justice. **Figure 2** depicts the final scores of each justice in this area, demonstrating a clear difference between the levels of support for unconstrained justices and constrained justices. Souter scored an anomalous 0% in this area, indicating that he did not align with Bush's policy preferences in a single case he voted in, electing instead to staunchly support affirmative action programs.

Case	TOTALS
Date	
<i>Constrained</i>	
O'Connor	0.8889
Kennedy	0.8571
Souter	0.0000
<i>Control</i>	
Rehnquist	1.0000
Scalia	1.0000
Thomas	1.0000

Fig. 2: Affirmative Action

This was also the only issue area in which O'Connor scored higher than Kennedy; her score of 88.9% in this area was also the highest score of any of the three constrained justices across all issue areas. Additionally, this issue area was the only one in which all of the unconstrained justices scored a perfect 100%, signifying a high level of support for administrative policy in this area. Again, I detected a statistically significant difference between the voting scores of constrained vs. unconstrained choices which resulted in affirmative action being saved on multiple occasions, like in *Grutter* and *Fisher* (data set assembled by author).

Establishment Clause

My research revealed the largest average difference between constrained and unconstrained justices in Establishment Clause cases. The final scores outlined in **Figure 3** show that the constrained justices were significantly less reliable in Establishment Clause cases than the unconstrained choices. While the constrained justices averaged a score of only 54.7%, the unconstrained justices ended with an average of 98.6% for a total difference of 43.9%. Here, there was over a 10-point difference between the highest scoring constrained justice (Kennedy) and the lowest scoring unconstrained justice (Scalia). Souter scored remarkably low again with only a 21.4% support rate, while O'Connor fell back to the midrange with a 57.6% support rate. Across the 49 cases I examined in this area, the constrained justices only contributed to the Reagan/Bush platform goals about 50% of the time, significantly less supportive than the unconstrained justice cohort (data set assembled by author).

Case	TOTALS
Date	
<i>Constrained</i>	
O'Connor	0.5758
Kennedy	0.8500
Souter	0.2143
<i>Control</i>	
Rehnquist	1.0000
Scalia	0.9583
Thomas	1.0000

Fig 3: Establishment Clause

Discussion and Conclusions

In sum, my research in this case study indicates that there is a demonstrable, quantifiable difference between the way that constrained choices vote on hot button political issues of great significance to their appointing president compared to unconstrained choices. **Figure 4** shows the overall averages for each justice and then the constrained and unconstrained choices across all three issue areas. Despite being appointed by the same presidents with identical platforms on these three issue areas, the constrained choices clearly voted for outcomes that Reagan and Bush would have desired less often than their unconstrained counterparts did. These results support my hypothesis that constrained choices do tend to deviate from their appointing president's agenda

more often than unconstrained choices. The constrained justice set followed Reagan's agenda most closely on abortion, albeit with several significant deviations like *Casey*, while the least supported issue area was the Establishment Clause, which may suggest that different topics will engender different levels of support from constrained justices.

This work can be expanded upon in several ways for future research. My methodology operated on a strict dichotomy of zero or one scoring to remain as objective as possible. However, these cases could also be assessed on a more fluid standard, assigning values of 0.5 to votes that achieved an outcome that compromised between outcomes Reagan and

Bush would have wanted and a more moderate option. Additionally, this framework could be expanded to other constrained justices and issue areas. For example, John Paul Stevens, Lewis Powell, and Harry Blackmun's voting records could also be assessed as constrained choices in various issue areas like the death penalty or civil rights. Both of these options could be pursued to expand upon the ultimate finding of my paper: constrained choices tend to follow their appointing president's agenda less strictly than unconstrained choices.

Of course, many other factors may contribute to the way justices vote on issue areas, especially contentious topics like those chosen in this case study. These factors include but are not limited to ideology, jurisprudential style, and legal interpretation, and the results here do not suggest that constraints on presidential choices are the only determining factor in voting outcomes. However, the results of this study do indicate that when presidents choose nominees, the level to which their choice is constrained by political factors is inversely related to the extent that the justices will promote the president's desired policy positions on certain issue areas. Thus,

	OVERALL
Case	TOTALS
Date	
<i>Constrained</i>	
O'Connor	0.6827
Kennedy	0.8418
Souter	0.2143
<i>Control</i>	
Rehnquist	0.9867
Scalia	0.9861
Thomas	1.0000
<i>Constrained</i>	0.5796
<i>Unconstrained</i>	0.9909
<i>Difference</i>	0.4114

Fig. 4: Total Scores

these findings provide insight on the possible behavior of different categories of justices as well as highlight an alternative factor that affects judicial decision making. Though we have not seen a constrained choice justice appointed to the Supreme Court since David Souter, these results provide a key indicator about how any constrained justice may vote in future terms of the Court. Additionally, when we think about the relationship between law and politics, these findings suggest that rule of law can be depoliticized by constrained choices because they adhere less closely to presidential agendas. In this way, constrained choices are incredibly significant to the superiority of rule of law over political influence.

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