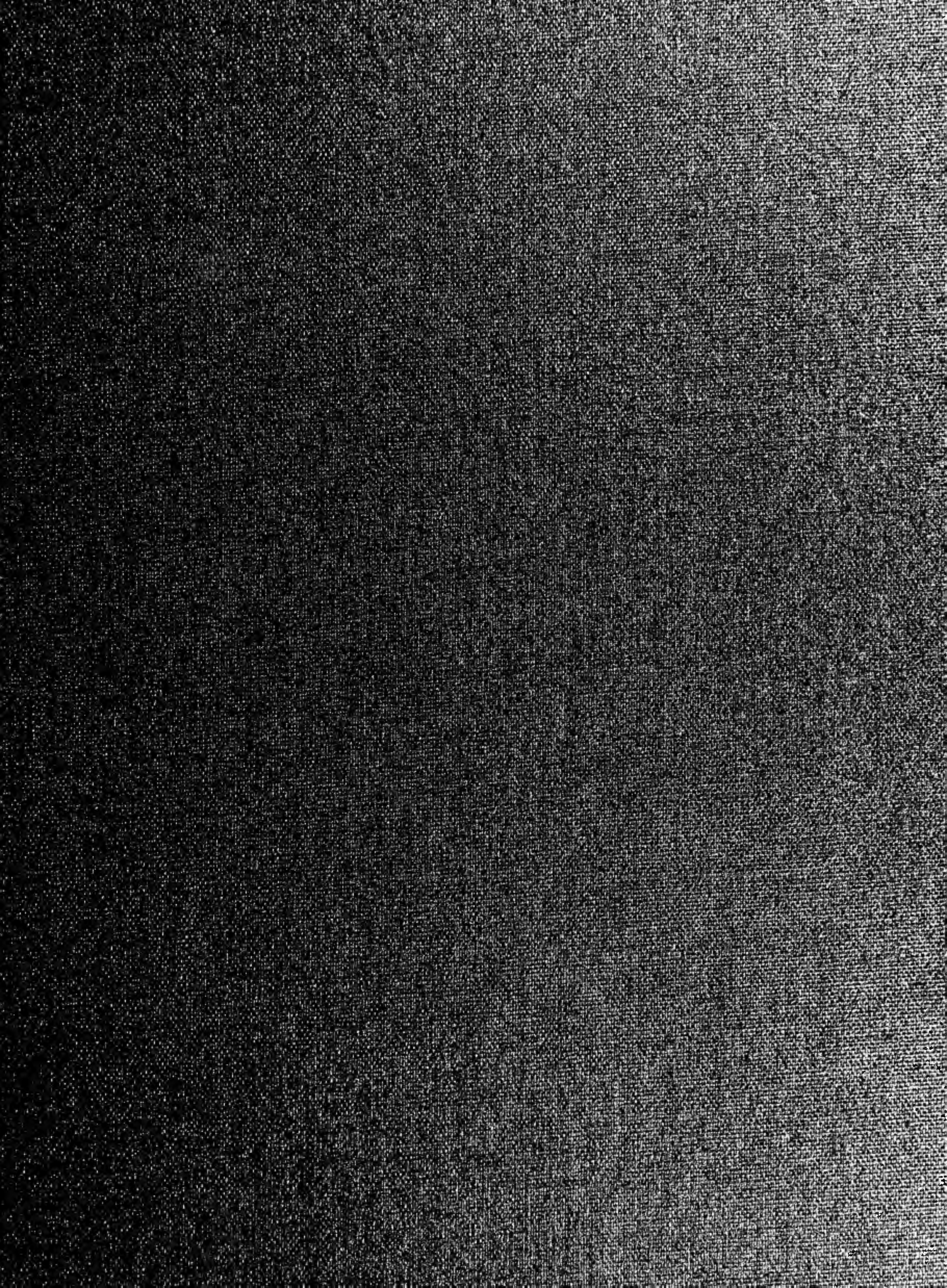

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An Economic Theory of Supreme Court Statutory Decisions: The *State Farm* and *Grove City* Cases

Rafael Gely
Pablo T. Spiller

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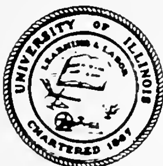

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WORKING PAPER SERIES ON THE POLITICAL ECONOMY OF INSTITUTIONS NO. 28

An Economic Theory of Supreme Court Statutory Decisions
The State Farm and Grove City Cases

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AN ECONOMIC THEORY OF SUPREME COURT STATUTORY DECISIONS
The State Farm and Grove City Cases

by

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Abstract: This paper follows Gely and Spiller (1989a) in modeling the Supreme Court as a self-interested, ideologically motivated actor, making decisions subject to the constraints imposed by the other political institutions of government, namely, the two houses of Congress and the President. We apply this framework to analyze the political rationales behind two major recent Supreme Court decisions, the State Farm and Grove City decisions. We show that both decisions can be understood as the Court reacting strategically to changes in the relevant political constraints reflecting changes in both Congress and the Presidency.

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I. Introduction

The role of the Supreme Court in the design of public policy has attracted much academic attention. The current debate on the role of the institutions of our political system, in particular that of the Supreme Court, has been basically normative.[1] Particular attention has been given to the normative properties of different institutional arrangements, for example, whether the Supreme Court should follow a restrained or activist policy. Whether any of those institutional arrangements would actually be carried out by self-interested agents, however, has not been analyzed.

In Gely and Spiller (1989a) we propose a rational choice theory of the Supreme Court. There we model the Supreme Court as a self-interested, ideologically motivated institution, making its decisions subject not to the traditional legal rules of precedent, but to the constraints arising from the political interests of the other institutions of government, namely Congress and the President. While we do not believe that this is a realistic description of the actual workings of the Supreme Court, our model provides a simple positive framework that is rich enough to analyze, and forecast, changes over time in the behavior of the Court, and in the determinants of public policy. In this paper we expand that framework to study the interaction between the Supreme Court and executive agencies. We also apply that approach to the analysis of two recent Supreme Court statutory decisions, the State Farm, and Grove

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[1] There has been a long-standing debate about whether the Court must follow an "activist" or "restrained" path. See, for example, Forte (1972), Halpern and Lamb (1982). Recent surveys of the different approaches to the analysis of the Supreme Court are Rohde and Spaeth (1976), Sheldon (1974), Halpern and Lamb (1982) and Wasby (1988). Among the classic positive approaches to the Supreme Court is that of Dahl (1957), who claims that, because of their recruitment, the Justices are a reflection of the electorate, and they play a "legitimizing" role. Dahl's hypothesis was later expanded by Funston (1975) to reconcile short term disagreements between the Court and Congress. See also Handberg and Hill (1980) and (1984) for a similar interpretation. An alternative view of the Supreme Court is provided in Adamany (1973), who claims that the Court constitute a force for instability. See, also Casper (1976).

City decisions. We show that both Supreme Court decisions can be understood as the Court reacting strategically to changes in the relevant political constraints reflecting the changes in both Congress and the Presidency, and not necessarily to legal precedent or to Congressional intent.

II. The Theory[2]

We develop here a simple model of Supreme Court-Congress-President relationship. We focus on statutory rather than Constitutional issues. Elsewhere we expand this framework to the analysis of Constitutional interpretations.[3]

Our analysis is based on several simplifying assumptions concerning our four players: the House, the Senate, the President and the Supreme Court.[4] Our first set of assumptions concerns preferences. In particular, we assume that all four players have well specified and stable preferences over the policy space (R^2). Furthermore, those preferences are assumed to be represented by strictly convex iso-preference contours (in particular, without loss of generality, we will assume they to be circular). Thus, each actor has an ideal point in R^2.[5] We call H,S,P and SC the

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[2] This section is based on Gely and Spiller (1989a), and hence it is only sketched here.

[3] Gely and Spiller (1989b).

[4] See Gely and Spiller (1989a) for a more detailed treatment of our basic framework.

[5] Our preference assumptions imply that our three collective bodies, the House, the Senate and the Court can each be represented as if it was composed by a single individual. These are simplifying assumptions that are based on the role of several institutions in Congress. In particular, the role of committees, of agenda setting, and of the assignment process, discounts the preferences of most Congressmen in favor of those of the relevant Committee members and in particular that of their chairs. Thus, in a sense, the preferences we call those of the House or the Senate reflect more those of the chairpersons of the relevant committees in the different houses of Congress. Also, while members of the Court are not elected and thus are not under direct constituency pressure, they are appointed by elected officials who do feel that pressure. Further, political considerations form part of the appointment process, making it important to consider the political preferences of the justices. Thus, it is reasonable to assume that, in the absence of changes in its composition, the

ideal points of the House, the Senate, the President and the Supreme Court respectively.

For every two players, we can define a contract curve in the policy space. A point in the policy space belongs to the contract curve between these two players, if a deviation from that point implies a reduction in the utility level of at least one of the players. Thus, a contract curve represents all those points in the policy space that the players could reach if they would bargain in isolation. We represent the contract curve between two agents i,j as C(I,J).

We focus on policy-making. Policy can be made by a specific legislative act, by the actions of an administrative agency (that is, a Presidential policy), or by a Supreme Court decision. We assume that the role of the Supreme Court decisions is to determine reversal policy points. That is, to define a policy that would take effect unless the House and the Senate reach an alternative arrangement. Thus, Congress can reverse a Supreme Court decision, but the President cannot. Similarly, Congress and the Supreme Court can reverse an administrative policy. However, for Congress to reverse it, both the House and the Senate must agree on an alternative policy. The Supreme Court, on the other hand does not need Congress to reverse a Presidential policy action. The role of the President, in our model, is to interpret and implement Congressional decisions through the administrative agencies. We assume that the President does not have the ability to veto Congressional actions.[6] The President, though, is subject to being overruled by both Congress and the Courts.

Long Run Political Equilibria

Consider a simple bargaining game among the House, the Senate, the President and

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Supreme Court has stable preferences over the policy space.

[6] See Gely and Spiller (1989a) for further discussion of the role of the Presidential veto.

the Supreme Court, where the Supreme Court determines the reversal policy outcome. Following Gely and Spiller (1989a), we first define the set of "feasible political equilibria." A feasible political equilibrium is a feasible bargaining outcome. Since any point in the House-Senate contract curve C(H,S) is preferred by both the House and the Senate to any point outside it, the President cannot administratively implement any policy outside C(H,S). Similarly, the Supreme Court cannot force a policy outcome outside C(H,S). To see that, consider a point outside the contract curve. The House and the Senate can agree on a point on the contract curve that will make them better off. Further action by the Supreme Court implying a reversal point outside the contract curve will trigger renewed Congressional bargaining, ending in a legislative outcome, again on the contract curve C(H,S).[7] Thus, feasible political equilibria are only those points in the House-Senate contract curve, that is, those points such that no other legislative outcomes would make both the Senate and the House better off. See Figure 1. While the President is not able to sustain a veto,[8] it may play a substantial role in determining the final equilibrium outcome in the absence of Supreme Court scrutinity.

From the set of feasible legislative equilibria, a "long run political equilibrium" should develop. Long run political equilibria are all feasible legislative outcomes such that no alternative policies could make the Supreme Court

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[7] If the Supreme Court would try to impose its ideal point SC as the policy outcome, it will face a reversal by Congress. If the Supreme Court tries, after being reversed, to again impose its ideal point as the policy outcome, both houses of Congress will support a constitutional amendment to further limit the power of the Court. Observe, however, that if the Supreme Court's decision changes the status-quo from one point to another, both in the contract curve, no constitutional conflict would arise since one house of Congress is necessarily made better off by the Supreme Court move. See Wasby (1988) and Casper (1976) for discussions of the constitutional implications of a "ruling-response-ruling-response" sequence.

[8] And thus, it is not able to bring legislative outcomes outside the contract curve C(H,S).

better off. Formally, X* is a long run equilibrium if no other point in the contract curve would make the Supreme Court better off (E_2 in Figure 1). That is, for an outcome to be a long run political equilibrium no other point on the contract curve could make the Supreme Court better off. Consider, for example, a case where the status quo is on the contract curve but the Supreme Court could be made better off by an alternative policy closer to, say, the ideal point of the House. Then, the Supreme Court by properly selecting a series of cases can change the reversal point so that bargaining between the House and the Senate brings the Court's most preferred point on the contract curve as the legislative policy outcome. At that point the political process ends, since bargaining among the House and the Senate cannot make both houses better off.

Let us start by considering a case where neither the Supreme Court nor the President may have substantial influence on legislative outcomes, that is, when the ideal points of both the House and the Senate are the same. Then, the long run equilibrium is represented by their ideal point (E_1), as in Figure 2. Figure 2 also depicts the positions of the President (P_1) and of the Supreme Court (SC). Assume now that as the result of elections, the Senate changed drastically, with its new ideal point closer to that of the President. In the absence of any Supreme Court action, the House will block any new legislation which will change the status quo away from E_1. Observe, however, that now the President can alter the implementation of the legislation. A policy point like R_1 leaves the Senate indifferent between the legal status quo (E_1) and the actual implementation (R_1). The President, however, is much better off at R_1. Such policy, like R_1, will be undertaken by an executive agency with the Senate blocking any legislative move against it.[9] The Senate, however, could

[9] The agency, however, may still face problems with Congress if the committee that oversees it does not support its policies. While the committee may not be able to force the agency to reverse its policy, it may try to influence the agency through

offer the House to legislate S_2 as the legal standard. Such a policy would be preferred by the House to, say, R_1, or to any other point in the contract curve between the President and the Senate. Thus, S_2 becomes the legal standard.[10] The introduction of the President, then, shifted the equilibrium from E_1 to S_2. In the absence of the President, E_1 would have remained the equilibrium. That is, in the absence of the Supreme Court, the President would have a strong impact on public policy.

Let us now introduce the Supreme Court. In Figure 2, the position of the Supreme Court has improved following the elections, since there are points along the new contract curve between the House and the Senate which provide it with a utility level above that of E_1. The Supreme Court is, in this case, worse off at R_1 than at E_1. Furthermore, given the new location of the Senate, the Supreme Court's best choice is a point like E_2, on the new contract curve between the House and the Senate. Thus, the Supreme Court, here, will act as restoring some stability to policy making. This stability was lost because of the President's ability to side with one of the houses of Congress in implementing the legislation.

Thus, E_2 becomes the equilibrium independent of the ideal point of the President. In other words, in our model, the presence of the Supreme Court reduces the discretionary power of the President. There is a role, however, that the president can play and it is to appoint justices to the court. To the extent that the President can appoint justices with similar preferences to his own, then, the President may have a lasting impact on public policy. His long run impact, however, may substantially

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different ways. Budgetary decisions as well as oversight activities may substantially disturb the agency's operations. See Spiller (1988), and references therein.

[10] In general, in the absence of the Supreme Court, then, the long run political equilibrium is characterized as that point in C(H,S) that maximizes the President's utility. Formally, ${}^{NS}X^* = \{X/X = \text{Argmax } U^P(x), \text{ s.t. } x \in C(H,S)\}$, with the superscript ^{NS} representing the absence of the Supreme Court.

exceed his impact on the current public policy.[11,12]

Comparative Statics

The model just described can be used to understand changes in the position of the Supreme Court, even in the absence of changes in its composition. Consider, for example, an initial long run equilibrium, E_1, where the House and the Senate are as depicted in Figure 3. Let there now the results of an election imply a large change in the composition of the House, so that it now would like to see, say, a stricter enforcement of federal regulations. Since the Senate has not changed, any new legislative equilibrium (in the absence of any Supreme Court ruling), should reside in the new contract curve between the House and the Senate ($C(H_2,S_1)$), and in particular in the bargaining area defined by E_1. The fact that the Senate did not change restricts the extent of policy change that can develop in the absence of Supreme Court intervention. Figure 3 shows, for example, that the new long run equilibrium may well be outside that area, with the new long run equilibrium, E_2, closer to the new ideal point of the House. Thus, the Supreme Court will usually follow the voters.[13]

It is worth now summarizing some of the main empirical implications of our framework concerning case selection and the rendering of statutory opinions by the Court. In particular, the probability that the Court will select a case depends on whether or not Congress experienced recent changes in its preferences in relation to

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[11] It is then not surprising, that current commentators see the appointments to the Supreme Court, more than any of his domestic policy choices, the main legacy of former President Reagan.

[12] We do not analyze here the role of the veto, since we are assuming homogenous houses of Congress. Thus, the President will not be able to block any legislative agreement between the House and the Senate. Elsewhere, Gely and Spiller (1989a), also model the impact of the Presidential veto in the presence of the Supreme Court.

[13] See, however, Gely and Spiller (1989a) for qualifications to this statement.

that issue.[14] In that case, the contract curve facing the Supreme Court has shifted, opening an opportunity for changing the status quo. Similar reasoning suggests that changes in the opinions of the Court will follow changes in the composition of Congress, its committees, and the preferences of the President.

In the following sections we apply the framework developed above to analyze two Supreme Court cases, and compare its main empirical implications with developments in Congress and the Presidency.

III. The State Farm Case.

This case is an example of the Court reducing the ability of the President to affect policy through administrative agencies.

Involved in this case is the extent of the National Highway Traffic Safety Administration (NHTSA) authority to rescind a previously issued standard. On June 24, 1983, the Supreme Court issued its opinion in Motor Vehicle Manufacturers Association of the United States, Inc. et al. v. State Farm Mutual Automobile Insurance CO. et al..[15] The Court held that the NHTSA's rescission of the passive restraint requirement in Modified Standard 208 (requiring the installation of passive restraints in new vehicles), was arbitrary and capricious. The agency, according to the Court, failed to present an adequate basis and explanation for rescinding the requirement and had to either consider the matter further or adhere to or amend the Standard along the lines which its analysis supports.[16]

Let us first discuss the events that preceded the State Farm decision. In 1966 Congress enacted the National Traffic and Motor Vehicle Act (1966 Act), with the

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[14] In particular, whether the chairs and members of the relevant committees have changed.

[15] 463 U.S. 29 (1983).

[16] Id. p. 34.

purpose of reducing "traffic accidents and deaths and injuries to persons resulting from traffic accidents."[17] The Act directs the Secretary of Transportation or his delegate to issue motor safety standards that "shall be practicable, shall meet the need for motor safety, and shall be stated in objective terms."[18] The Secretary of Transportation delegated this authority to the NHTSA.

Under the authority of the Act, the Department of Transportation issued, in 1967, Standard 208, which at that time simply required the installation of seatbelts in all automobiles.[19] Having noticed a low level of seatbelt usage, the Department started to consider the possibility of requiring "passive occupant restraint systems." After some discussion, the Department revised Standard 208 to include passive protection requirements.[20] Two years later, in 1972, the agency amended the Standard to require full passive protection for all front seat occupants of vehicles manufactured after August 15, 1975. The two types of passive restraints considered were automatic seatbelts and airbags. Vehicles built between August 1973 and August 1975 were to carry either passive restraints or lap and shoulder belts coupled with an "ignition interlock" that would prevent starting the vehicle if the belts were not connected.

The ignition interlock option proved to be very unpopular and Congress in 1974 amended the Act to prohibit a motor vehicle safety standard from requiring or permitting compliance by means of an ignition interlock or a continuous buzzer

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[17] 15 U.S.C. S. 1381.

[18] In issuing these standards, the Secretary or his delegate is directed to consider "relevant available motor vehicle safety data," whether the proposed standard is "reasonable, practicable and appropriate" for the particular type of motor vehicle for which it is prescribed, and "the extent to which such standards will contribute to carrying out the purposes of the Act." 15 U.S.C. S1392(a), (1976 ed. Supp. V), and 15 U.S.C. S1392(f)(1),(3),(4).

[19] 32 Fed. Reg. 2415.

[20] 34 Fed. Reg. 11,148 (July 2, 1969).

designated to indicate that safety belts were not in use. The 1974 amendments also provided veto power to Congress for any safety standard that could be satisfied by a system other that seatbelts.[21]

In 1976, the Secretary of Transportation, suspended the passive restraint requirement, arguing that there would be widespread resistance to the new system.[22] Months later, however, a new Secretary issued, in 1977, a new mandatory passive restraint regulation, known as Modified Standard 208.[23] As modified, the Standard required the installation of airbags or passive seatbelts. During the following three years, Modified standard 208 survived both judicial and Congressional scrutinity.[24]

With the Reagan administration coming to power, a new perspective on regulatory reform was introduced. A central concern of the administration was the simplification of administrative rules implementing regulatory statutes. One of the administration's

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[21] Motor Vehicle and School bus Safety Amendments of 1974, Pub. L. 93-492, S109, 88 Stat. 1482, 15U.S.C, S 1410(b), and S1410(B)(2).

[22] Rule-making opening reported at 41 Fed. Reg. 24,070 (June 14, 1976). Final decision reported at Department of Transportation, The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection (Dec. 6, 1976) (Coleman decision) Joint Appendix (J.A.) 2065.

[23] 42 Fed. Reg. 34289 (1987); 49 C.F.R. S571-208 (1978).

[24] For example, in Pacific Legal Foundation v. Department of Transportation, the Court of Appeals upheld Modified Standard 208 as rational, non-arbitrary regulation consistent with the agency's mandate under the Act. (193 U.S. App. D.C. 184, 593 F.2d. 1338, cert. denied. 444 U.S. 830 (1979).) The Supreme Court denied certiorari of the Court's of Appeal's decision. Similarly, the Modified Standard also survived congressional scrutinity. Congress failed to exercise its authority under the legislative veto provision of the 1974 Amendments. While no action was taken by the full House of Representatives, the Senate Committee with jurisdiction over NHTSA affirmatively endorsed the Standard. (S. Rep. No. 95-481 (1977).) Several others rulings dealing with Modified Standard 208 were considered during the next several years. For example, on May 22, 1978 a notice of proposed rule-making was issued in response to a petition from General Motors requesting some more flexibility in the design of emergency release mechanisms for automatic seatbelts. (43 Fed. Reg. 21,912 (May 22, 1978).) NHTSA granted the proposal six months later. (43 Fed. Reg. 52,493 (Nov. 13, 1978).)

major efforts was directed to the rescission of the passive restraint standard.[25] It was apparent that the House of Representatives, which remained dominated by Democrats, would not go along with the President's intent. Facing such opposition, the Administration started to implement policy changes through the administrative route.[26]

The Reagan administration, then, announced a one year delay in the implementation of NHTSA's passive restraint standard. In February 1981, Secretary of Transportation Andrew Lewis reopened the rule-making and argued that a one year delay was necessary because of the "dramatic changes in the production plans for the 1982 model fleet," and because, "the economic and other justifications for the existing phase-in scheduling have changed dramatically since the standard was adopted in 1977."[27] The delay was also needed, Lewis argued, to allow NHTSA officials time to reexamine the entire passive restraint issue. As part of his proposal, however, Lewis prepared three alternative amendments to the rule: (1) reversing the order of compliance, so that small cars were to be equipped first, (2) requiring all cars to comply with the standards by March, 1983, or, (3) rescinding the standard altogether.[28]

Shortly thereafter, the NHTSA issued a final rule (Notice 25), rescinding the passive restraint requirement as contained in Modified Standard 208. In explaining the rescission, NHTSA maintained that it was not longer able to find, as it had when the Standard was issued, that the automatic restraint requirement would produce significant safety benefits.[29]

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[25] See, for example, Thomas, Wildemann and Brown (1987), p.31.

[26] Id.

[27] 46 Fed. Reg. 53,420 (1981).

[28] Thomas, Wildemann and Brown, (1987).

[29] In addition, given the low benefit-cost ratio arising from the analysis of this requirement, NHTSA feared that many consumers would regard Modified Standard 208 as an instance of ineffective regulation. (46 Fed. Reg. 53,419 (Oct. 29, 1981).)

In holding that the rescission of modified Standard 208 was arbitrary and capricious, the Supreme Court noted that the rescission of a standard must pass the same degree of scrutiny by the judiciary as would the enactment of new regulation. The Court found that NHTSA had failed to present adequate basis and explanation for rescinding the requirement, and ordered it to consider the matter further or to adhere to or amend the Standard along the line which its analysis supported previously. Before the Supreme Court decision, however, there was uncertainty whether the administrative elimination of a regulation should be held to the same standards as their introduction. Thus, the Supreme Court decision did not simply imply the application of a standard precedent rule. State Farm did open new legal grounds.[30] Thus, it is worth investigating whether there is a political economy rationale for the decision.

Figure 4 is a graphical description of these events as they would be interpreted by the model in this paper. We first identify the dimension or issues involved in the case. In State Farm the Court confronted two issues. The issue of immediate attention was the validity of Modified Standard 208, and thus the extent of safety regulation in the automobile industry. A different issue was the extent by which the President can deregulate via administrative rules without the consent of other branches.

Having defined the dimensions we need next to define the relevant ideal points for the President, Congress and the Supreme Court. The President position is not difficult to locate, since President Reagan was very vocal about his preferences. The new Administration's preferences called for a substantial reduction in safety regulation, and also for administrative deregulatory power.

The House and the Senate's preferences, before 1980, were on the other direction.

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[30] Garland (1985).

We focus on the chairmen of the committees with jurisdiction over motor vehicle safety. In the Senate, the relevant committee was the Commerce Committee (later to be named the Commerce, Science and Transportation Committee). From 1966 to 1979, the committee was controlled by Democrats. Up to 1976 the chairman was Senator Magnuson (D. Wash.). As revealed by bills Senator Magnuson introduced during his tenure in Congress, he was in favor of extensive government safety regulation.[31] The preferences of the rest of the members of the Senate are expected to be at least in the same direction as those of Senator Magnuson.

In 1981, however, there was a change in the dominating preferences in the Senate. The new chairman of the Commerce Committee, Senator Packwood (Rep. Oregon), showed different preferences. By analyzing some of his legislative efforts during this period, we can see that Packwood supported more federal deregulation and, to some extent, less safety regulation than his predecessors.[32]

In the House we have that the committee with jurisdiction over the relevant issue was the committee on Interstate and Foreign Commerce. From 1966 to 1980, R. Staggers (D. W.Va.) acted as committee chairman. In 1981, however, the jurisdiction over motor vehicles safety was given to the committee on Energy and Commerce, under the chairmanship of R. Dingell (D. Michigan). Both, Dingell and Staggers, were supporters of government safety regulation.[33] Thus as depicted in Figure 4, the preferences of the House, both before and after 1980, are for less federal deregulation and more

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[31] For example, S. 1883 (1976) (directing the Secretary of Transportation to issue standards for fuel economy performance); S 1302 (1976) (to promote safety and health in the mining industry).

[32] S 2038, for example, introduced in the 98th Congress, provided for the deregulation of the trucking industry.

[33] For example, H 14,256 (96th Congress) provided for an increase in consumer protection in relation to drugs and cosmetics. Similarly, H 4175 (95th Congress) provided for an extensive use of seatbelts.

extensive safety regulatory provisions than the Senate.[34] The contract curve connecting H_0 and S_0 represents the political configuration pre-1980, with E_0 representing the Modified Standard 208. Following the 1980 election there is a new contract curve, with the Senate moving away from the House. The main change in the Senate's ideal point (and thus in the contract curve), is along the Federal Deregulation dimension.[35] Similarly, the new President moves with the Senate. For simplicity, we assume that the ideal points of the Senate and the President are the same. The change in the political configuration undermines the long run equilibrium nature of the status quo. In the short run, however, before the Supreme Court acts, the President can try to "pull" the policy outcome towards his ideal point, even though the House will block any detrimental change to the current legislation. The opening of the rule-making by Secretary Lewis in 1981, and the rescission of Modified Standard 208, can be interpreted in this way. (P_1, S_1) in Figure 4, represents the NHTSA's ruling. Since at S_1 the Senate is at its ideal point, it will block any new legislation which may alter the NHTSA's position.[36]

Several bills were introduced in Congress shortly after the February 1981 announcement and before the State Farm decision. As expected by our framework, however, none of those legislative initiatives were acted upon. (See the Appendix).

The NHTSA's decision, then, allowed the Senate to achieve an outcome close to its ideal point without having to get directly involved in the enactment of legislation.

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[34] Since less populated states have a relatively larger representation in the Senate than in the House, it is reasonable to predict that the Senate will usually be less responsive to regulatory measures than the House. See, McCubbins, et al (1989).

[35] Thus, we should expect the main change in the long run equilibrium to be along that dimension as well.

[36] Furthermore, since the NHTSA's ruling may backfire in the public opinion eyes, pressing for legislation supporting the Administration's view, may be politically costly. Thus, we would not expect the Senate to promote new legislation to make the NHTSA position part of the legal standard.

At the time of the State Farm decision, then, the situation can be described as follows: an agency decision has modified the status quo, and has tilted the balance of power in favor of the Senate, creating a stalemate in legislative action. It is at this point that we would expect the Supreme Court to, opportunistically, enter a decision to restore a policy closer to the previous status quo. R_1, in Figure 4, represents the State Farm case. R_1 is more attune with what the status quo was before 1980, since it moves the status quo away from S_1 towards H_0.

In deciding whether the NHTSA's rescission of the passive standard requirement was proper, the Court had to determine first what standard of review to apply in general to administrative rulings.[37] As mentioned above, the Court held that a rescission of a rule is subject to the same standard of judicial review, "the arbitrary and capricious standard", as is the promulgation of a new rule. Garland (1985) argues that the Court's ruling endorsed both the quasi-procedural, as well as the substantive elements of the "hard look" doctrine of judicial review of agency's decisions. This doctrine places renewed emphasis on ensuring agency fidelity to congressional purpose. Since the NHTSA failed to supply a reasoned analysis justifying the change in policy, it did not satisfy the quasi-procedural elements of the doctrine.[38]

Because of its precedent value, the State Farm decision can be understood as an attempt by the Court to restrict the extent of interference by other agencies in the process of regulatory legislation.

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[37] Garland (1985), pp. 542-548.

[38] Furthermore, the agency seems to have also violated the substantive elements of the doctrine in at least two respects: (1) lack of records in support of its findings of fact; and (2) failing to establish a reasonable relationship between its decision on the one hand, and the relevant evidence, alternatives, and statutory purpose, on the other. Garland (1985 p.546).

V. Grove City v. Bell[39]

The Supreme Court decision in Grove City, on February 28, 1984, involves the power of the Department of Education under Title IX of the Education Amendments of 1972.[40] The 1972 amendments prohibit employment discrimination on the basis of sex in educational institutions receiving federal funds. The issue at hand is the determination of the appropriate scope of the Department of Education's enforcement powers under Title IX.

The two sections relevant here are sections 901 and 902. Section 901 prohibits discrimination on the basis of sex by any education program or activity receiving federal assistance. Section 902, the enforcement provision for Section 901, provides in its pertinent parts that compliance may be effected by, among other alternatives, "the termination of or refusal to grant or to continue assistance under such program or activity to any recipient ..., but such termination or refusal shall be limited in its effect to the particular program, or part thereof, in which noncompliance has been so found."[41]

The plain language of Section 902 appears to indicate a program-specific type of enforcement. However, there has been extensive debate on the meaning of Section 902. Marks (1987) argues that an examination of the legislative history of the Act points towards the conclusion that an institution-wide type of enforcement provision was intended. It has also been forcefully argued, however, that a program-specific enforcement provision is more truthful to congressional intent. Garvey (1986), examines the language of several antidiscrimination statutes which used language similar to that of Title IX. He concludes that the current language of Title VI of

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[39] 465 U.S. 555 (1984). For a political economy analysis of this case, see Marks (1987).

[40] In 1972 the Higher Education Act was enacted into law as the Education Amendments of 1972. Pub. L. 92-318, Title IX, S 902, 86 Stat. 373, 20 U.S.C. S 1682.

[41] Id.

the Civil Rights Act of 1964, Title IX, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, supports a program-specific enforcement provision. Each of the statutes begin with a prohibition against discrimination in any "program or activity receiving Federal financial aid" and then proceed to make clear that the phrase "program or activity" means something less than "recipient", "educational institution," or "political entity".

Not only has there been debate at the congressional level on the meaning of Section 902, but courts have struggled with the issue as well. Several federal courts have decided in favor of an institution-wide enforcement provision. One such example is Haffer v. University, involving an athletic program which did not receive earmarked funds covered under Title IX.[42] Several other cases have followed the same approach when deciding the appropriate enforcement type for other antidiscrimination statutes.[43] On the other hand several other courts have interpreted the enforcement provisions of antidiscrimination statutes as program-specific.[44]

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[42] 524 F. Supp. 531(E.D. Pa. 1981), affirmed 688 F. 2d. 14 (3rd Cir.1982).

[43] As to Section 504: Wolff v. South Colonie School District, 534 F.Supp.758 (N.D.N.Y. 1982) (school trips covered). As to Title VI: Board of Public Instruction of Taylor Co. v. Finch, 414 F.2d.1068 (5th Cir.1969) (assumes institutional-wide coverage); United States v. Jefferson Co. Board of Education, 372 F.2d. 836 (5th Cir.1966), affirmed en banc, 380 F.2d.385, cert. denied subnom; Caddo Parrish Board of Education v. United States, 389 U.S. 840 (1967) (Title VI institution-wide desegregation order appropriate).

[44] For example, Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d.418 (6th Cir. 1982) (the entire college as an institution was not a "program within the meaning of Title IX), vacated and remanded, 466 U.S. 901 (1984); Rice v. President & Fellows of Harvard College, 663 F.2d. 336 (1st Cir. 1981) (allegation that the law school at the college in question received federal funds for its work study program, without allegation of sex discrimination in school's handling of that program, was insufficient to invoke the protection of the Education Amendments of 1972); Dougherty County School Sys. v. Harris, 622 F.2d 735 (5th Cir.1980) (Title IX does not authorize Secretary to terminate all federal aid because of any discrimination in a school system if the federally assisted programs are administered impeccably); Romeo Community Schools v. Unites States Department of Health, Education, and Welfare, 600 F.2d 581 (6th Cir. 1979) (Title IX applies only to students involved in programs or activities receiving federal financial assistance and does not apply

Notwithstanding this debate over the interpretation of the enforcement provision, the preferences of the committees with jurisdiction over this issue in both houses can be clearly defined. Marks (1987) shows that up to 1980 the House committee on Education and Labor had stable preferences. The average mean ADA score of democrats was relatively high (a liberal vote on the issue of enforcement is one in favor of institution-wide coverage).[45] During this same period similar tendencies dominated the Senate committee on Labor and Human Resources. Not only did a democratic majority controlled the committee, but in addition the ranking minority member of the committee, Republican Jacob Javits, was a principal sponsor of the original legislation and a supporter of institution-wide termination.[46]

Thus, until 1980 the status quo could be understood as requiring institution-wide enforcement. E_0 in Figure 5 represents this policy outcome. We assume that until 1980 the ideal points of both houses of Congress were very close in the policy space, supporting both institution-wide enforcement. E_0 is assumed to be on the contract curve $C(H,S_0)$, where H and S_0 represent the House and Senate ideal points. E_0 is also assumed to represent the initial long run equilibrium.

In 1980 a change in the political composition of Congress opened the opportunity for the Supreme Court to strategically alter the status quo. Although the House Committee in Education and Labor continued to be controlled by democrats (thus we keep the ideal point of the House at H), the Senate experienced a large change. A republican majority now dominates the Committee on Labor and Human Resources, with the consequent change in committee preferences. Marks (1987) shows that the mean ADA

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additionally to employees of educational institutions receiving such assistance), cert. denied, 444 U.S.972 (1979).

[45] Marks (1987) also analyzes the length of continuous service to show the importance of these legislators.

[46] Id at p. 25.

legislative scores for the Senate committee under republican domination was lower than the committee mean under democratic domination.[47] Furthermore, the new chairman of the Senate committee, Senator Hatch, was a strong supporter of program-specific enforcement.

This change in the political configuration is represented in Figure 5 by the new contract curve $C(H,S_1)$, with E_1 representing the new long run equilibrium.

The Court is now before a divided Congress. Since the House has not changed, the bargaining set is very small (not depicted in Figure 5 to avoid excessive clutter). Thus, major legislation will not come out of that Congress. On the other hand, the Senate will support any change in the status quo that the Supreme Court would like to undertake.

As predicted by the model, shortly thereafter, on 1981, the Court granted certiorari to consider North Haven Board of Education v. Bell.[48] This case involved the validity of Title IX regulations promulgated by the Department of Education. These regulations prohibited federally funded education programs from employment sex discrimination. Although the issue of the enforcement provision of Title IX was not directly involved, North Haven gave an opportunity to the Court to signal its desire to clarify the debate, by intervening directly, if necessary. *In dicta*, the Court expressed its opinion to the fact that an examination of Title IX's language, as well as of its legislative history, corroborate a program-specific type of enforcement.[49]

While the Court was struggling with the interpretation of Title IX, several bills and resolutions were being introduced in Congress on the same issue. Apart from their legislative purpose, these bills served to communicate to the Court the different

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[47] Id at p. 26.

[48] 456 U.S. 511(1982), cert. granted 450 U.S. 909(1981).

[49] North Haven, 456 U.S. 511, 537.

houses' preferences on this issue.[50]

In Grove City the Court went on to make North Haven's *dicta* the main ruling of the case. Although deciding in favor of a broad triggering clause, i.e., that any kind of financial aid even if given directly to students would trigger Title IX coverage, the Court held that the enforcement provision of Title IX was intended to be program-specific.

As argued above, following a drastic change in the preferences of one of the houses of Congress, the Senate on the case at hand, we would expect the Court to intervene. The intervention of the Court would bring a new policy outcome which may well be outside the bargaining area between the Senate and the House. In fact this is the case with Grove City. Program-specific enforcement had been the kind of enforcement Senator Hatch signaled to the Court as the Senate's preference. Although the Court decided against a broad triggering clause, it sided with Hatch in the most relevant issue. Thus, again, the Court followed the electorate.[51]

Following Grove City several other bills were introduced both in support and against the Court's decision. As predicted by our model, no legislation came out

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[50] In June 11, 1981, Senator Hatch, now Chairman of the Committee on Labor and Human Resources, introduced S 1361 to reinforce the program-specific nature of Title IX; to provide for a narrow triggering clause; to restrict the scope of the Act to students; and, to include under the jurisdiction of the Act the admission process of recipients. Senator Hatch seems to have had the Court in mind: "The amendment would dispose of the issues in the Grove City College versus Harris case, currently on litigation, in which the Department of Education has contended that Federal aid to a student is sufficient by itself to subject to Title IX all the activities of whatever school he or she decides to attend.", 127 Cong. rec S636 (daily ed. Jan. 24, 1981). Two other bills were also introduced. SR 478 was introduced on September 22, 1982, and HR 190 was introduced on May 10, 1983. It reported without amendment, with the intention of signaling to the Court the House's preferences for institution-wide fund termination.

[51] It has been argued that the Court's decision in Grove City was in fact the correct legal interpretation of Title IX. Garvey (1986) argues that program-specific enforcement is the standard that better fits the rationale under which Congress decided to forbid discriminatory practices by those receiving Federal aid.

before the new Congress.[52]

In 1986 the Democrats regained control of the Senate, while the Executive remained Republican. It is reasonable to assume that the new position of the Senate was almost identical to that of the House. Thus, the contract curve between the House and the Senate collapses to point $H=S_2$, with $H=S_2$ becoming also the new long run equilibrium.

After this drastic change in the political configuration of Congress our model suggests that there should be an attempt by Congress to overturn Grove City. In fact in 1987 Senator Kennedy introduced S. 557. The bill was similar in language and scope to S. 431. It was introduced under the findings that the Supreme Court had "unduly narrowed or cast doubt upon the broad application" of Title IX and therefore legislative action is necessary to restore the institution wide application of Title IX.[53] On January 28, 1988 the Senate voted favorably upon S. 557. The bill was passed by a vote of 75-14.[54] The House approved the bill on March 2, 1988 by a vote of 315-98.[55]

From Figure 5 it is clear that under the new contract curve, Grove City, E_1, is not longer a long run equilibrium. The new long run equilibrium (S.557) is slightly broader than the status quo before Grove City and must be located in the area to the

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[52] For example, S2363 (Feb. 28, 1984: to change "program or activity" to include institution); S 2568 (April 12, 1984: to restore Title IX to its broad coverage in enforcement); S 2910(August 7, 1984); S 3079(Oct. 5, 1984). S.431 and HR 700 (february 7, 1985: to restore the prior executive branch interpretation and broad, institution wide application of Title IX); S. 272 (January 24, 1985, to require than in the case of educational institutions, the phrase "program or activity" shall mean the entire institution).

[53] S. 557, enacting clause, 134 Cong. Rec. S266 (daily ed. Jan. 28, 1988).

[54] Id.

[55] 134 Cong. REc. H 565 (daily ed. March 2, 1988).

right of E_0.[56]

To summarize, Grove City provides a good example of strategic behavior by the Courts. In the same way as in State Farm, facing a divided Congress, the Court chooses to intervene by obtaining support from one of the Houses of Congress (in State Farm the House, in Grove City the Senate). Once Congress becomes unified again, the Court does not try to maintain the status quo, and instead allows Congress to adjust the legislative outcome.

V. Final Comments

This paper provides a micro-analytic model of Supreme Court statutory decisions, and used to understand, in a consistent way, two major recent Supreme Court decisions. These cases show how the Supreme Court responds to political changes.

In both cases the Supreme Court follows the electoral results by adjusting to the changes in the composition of Congress and the Presidency. On the one hand, in State Farm, the Supreme Court acted to reverse an administrative policy which was implemented following a change in both Congress and the President that, in the absence of the Supreme Court, would have implied a drastic shift in regulatory policy. In Grove City, however, the Supreme Court moved to make a new policy following a change in the composition of the Senate. Such new policy would have not, in the absence of the Supreme Court move, come out of Congress, since it would have been blocked by the House of Representatives. In both cases the Supreme Court decisions were supported by one of the houses of Congress, and thus, they could not be reversed by the then

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[56] The exact position of E_2 will depend of the significance attached to the Danforth amendment. (S. 557, 134 Cong. Rec. S266 (daily ed. Jan. 28,1988)). The Danforth amendment provides that institutions receiving aid are not required to provide or pay for abortions. The concern was that denial of abortion or related services would be perceived as discrimination against women. Reports in the press (eg New York Times, March 3, 1988) suggested that acceptance of the amendment led many republicans to support the bill, giving Congress the supermajority needed to overturn a possible Presidential veto.

current Congress.

To summarize, we see in this paper the dual role that the Supreme Court can play. On the one hand it can be seen as supporting the status quo, and restraining both the President and Congress from undertaking a drastic regulatory change. On the other hand, the Supreme Court played an activist role, by introducing a policy that changes the status quo, even though Congress could not, by itself, legislate such policy change. Thus, these two examples show that whether the Supreme Court is activist or restrained will depend on the political circumstances. Following changes in Congress that create legislative stalemate we would expect the Supreme Court to be activist. On the other hand, following a large change in the Presidency we would expect the Supreme Court to follow a restrained path.

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APPENDIX

BILLS INTRODUCED TO AMEND THE NTMV ACT OF 1966

DATE & TITLE	SPONSOR	SUMMARY
April 10, 1981; H 3237	Wirth (D)	To amend the NTMV Act of 1966 to require the installation of passive restraint systems in small new cars
October 26, 1981; S 1773	Danforth (R)	To amend the NTMV Act of 1966, to require from all car manufacturers the installation of automatic crash protection systems in new passenger cars.
November 24, 1981; S 1887	Danforth (R)	To amend the Internal Revenue Code to encourage the use of airbags, allowing manufacturers to claim a refundable tax credit for the installation of airbags in 1984 and beyond, and imposing an excise tax on new cars without this technology.
Feb. 15, 1983; S 477	Danforth (R)	To amend the Internal Revenue Code of 1954 and the NTMV Act of 1966 to expedite the installation of automatic safety airbags.
April 21, 1983; H 2693	Lantos (D)	To enact the Highway Safety Act of 1983.
Oct. 20, 1983; H 4175	Dingell (D)	To amend the NTMV Act of 1966 to provide for more extensive use of safetybelt systems in passenger motor vehicles, in order to assist in reducing health, dissability, and other costs
June 28, 1984; S 2828	Moyniham (D)	To amend the NTMV Act of 1966 to require the provision of automatic safety airbags in all automobiles, beginning on or after Sept. 1, 1986.

FIGURE 1

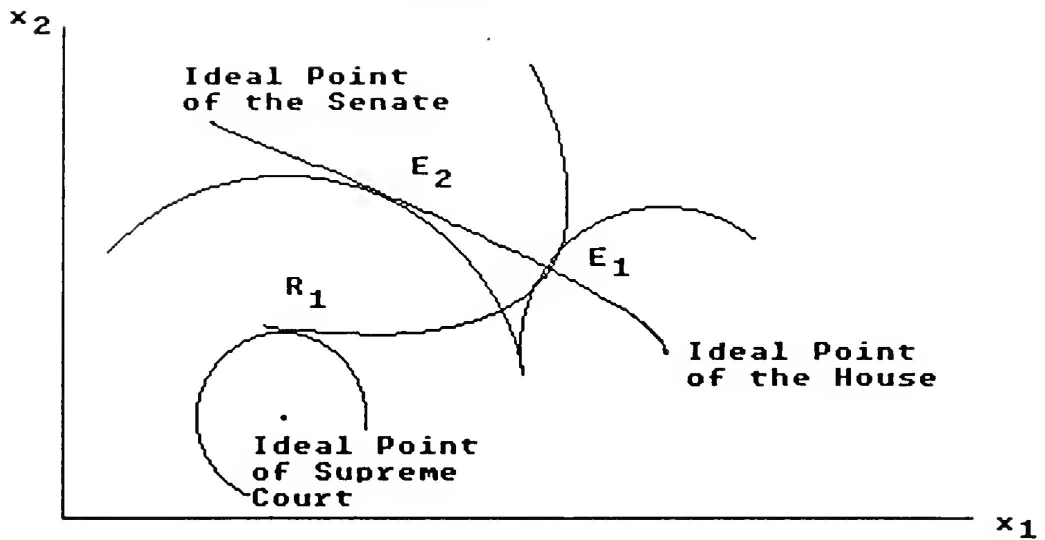


FIGURE 2

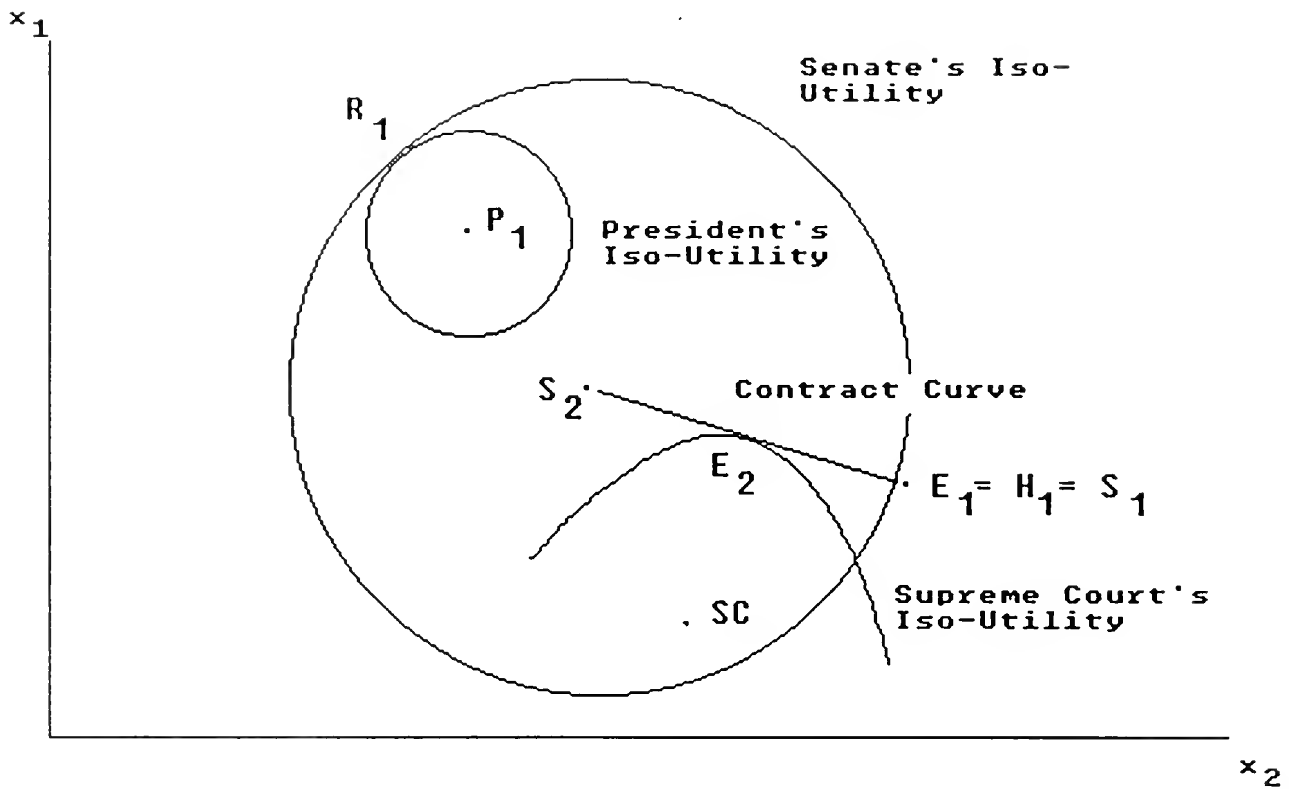


FIGURE 3

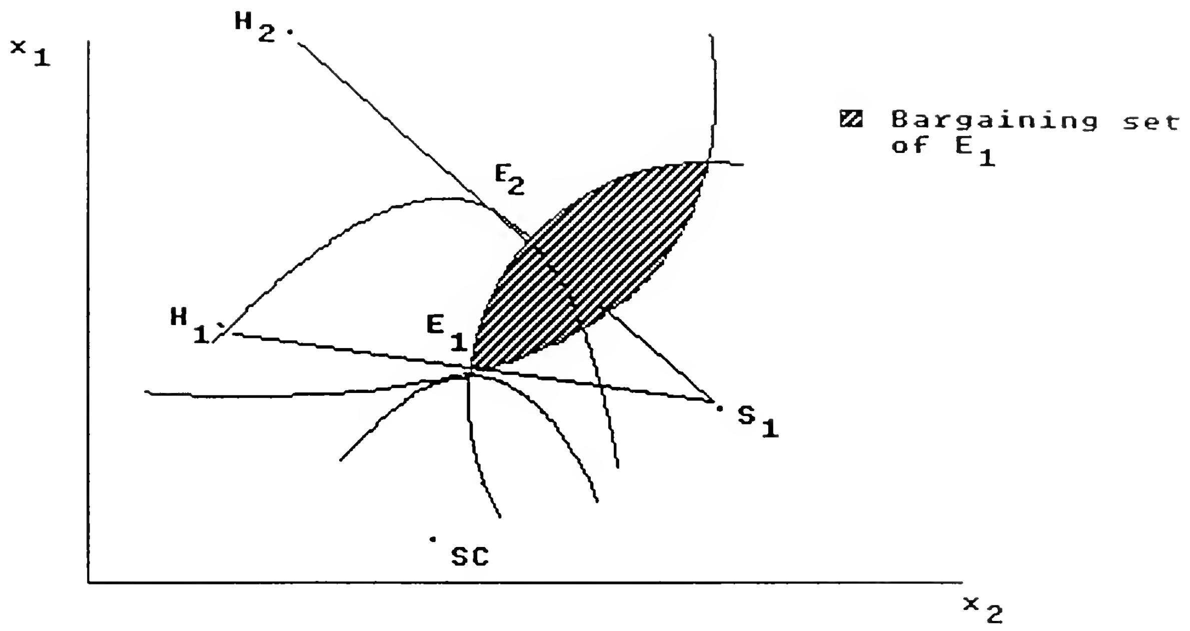


FIGURE 4

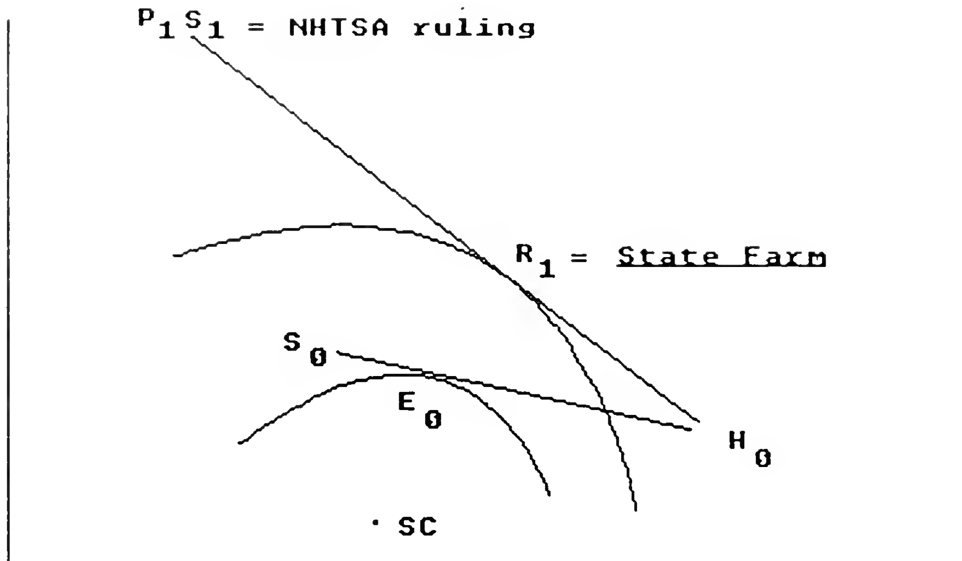
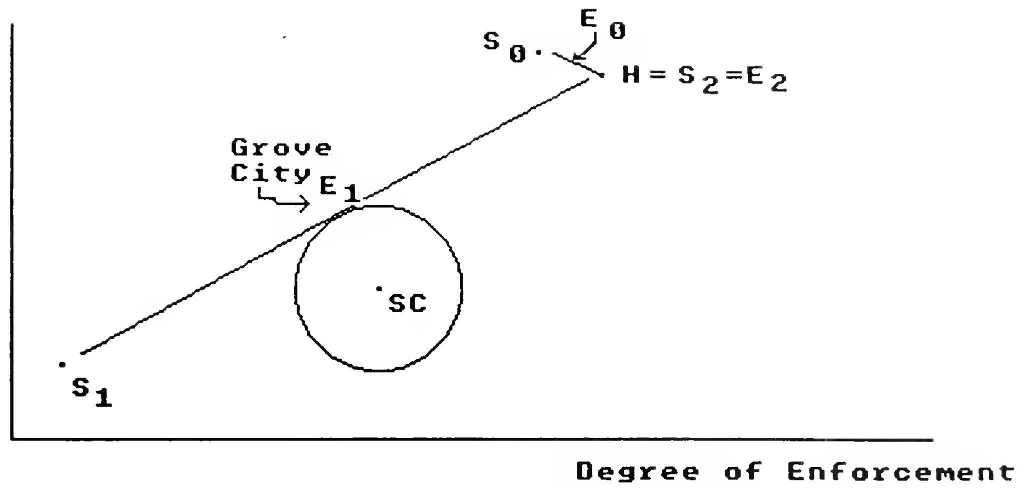


FIGURE 5



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