

## The Supreme Court is constrained by public opinion in cases where the justices fear nonimplementation of their decisions

*With each controversial case they hear, questions arise about the influence of public opinion on the Supreme Court. **Matthew Hall** examines the types of cases where the Supreme Court appears constrained, and finds when a ruling must be implemented by government actors outside the judicial hierarchy, external pressures exert a stronger influence on the Court. He argues that nonimplementation fears are only relevant to a small subset of cases in the Supreme Court docket, indicating that judicial scholars should be attentive to different contexts rather than searching for universal tendencies of the Court's behavior.*



In June 2012, the U.S. Supreme Court issued its landmark decision in the *Patient Protection and Affordable Care Act* cases. In the months leading up to the ruling, President Obama and congressional Democrats “[waged a not-so-subtle pressure campaign on the Supreme Court](#),” urging the justices to uphold the Act, yet despite these efforts, the justices insisted they were impervious to external pressure. When asked about the health care case, Justice Thomas [dismissed](#) the possibility of outside influence: “You stay focused on what you’re supposed to do. All that other stuff is just noise.” Three months later, Chief Justice Roberts unexpectedly joined the liberal wing of the Court and voted to uphold the health care law.

Notwithstanding assurances from Justice Thomas, Court [observers](#) have [long](#) noted its tendency to, in the words of the famous [Mr. Dooley](#), “follow th’ illicion returns” (follow the election returns). Scholars have amassed considerable [evidence](#) that public opinion constrains the justices’ decision making, and elite preferences [constrain](#) their exercise of judicial review. Yet, others raise doubts about the extent and nature of external influence, and [scholars](#) continue to debate the causal mechanism behind this phenomenon.



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In this article, I evaluate an often mentioned, yet untested theory of Supreme Court constraint: I argue the Court is constrained, at least in part, because the justices fear nonimplementation of their decisions. Accordingly, the effect of external pressure is strongest when the threat of nonimplementation is most severe. When the justices can confidently assume implementation of their decisions, they are less constrained by external forces.

The Court has traditionally been viewed as holding “[no influence over either the purse or the sword](#).” In fact, [many argue](#) that the Court is severely limited in its ability to induce social or political change, and “[\[i\]mplementation of the Court's policies is far from perfect](#).” However, [other studies](#) suggest the Court may possess significant power

to affect social change, at least in certain contexts. The Court is especially successful at altering behavior when it issues rulings related to criminal law, civil liability, or judicial administration, [regardless of public opinion](#). The Court tends to alter behavior in these “vertical” cases because implementation is controlled by lower courts in the judicial hierarchy, and these courts [overwhelmingly](#) adhere to Supreme Court precedent. Of course, lower-court compliance is [not perfect](#); judges sometimes exercise considerable discretion when making decisions. Nonetheless, lower-court defiance is rare, and the Court’s [“hierarchical control appears strong and effective.”](#)

The Court does not enjoy the same degree of policy control in cases unrelated to criminal law, civil liability, or judicial administration. Rulings in these “lateral” cases must be implemented by government actors outside the judicial hierarchy, usually elected officials or their agents. These elected officials must consider their constituents’ interests and generally respond to public opinion. Consequently, the implementation of Court rulings in lateral cases depends on the popularity of those rulings, whereas the implementation of rulings in vertical cases [does not](#)

This differential power dynamic creates an avenue for evaluating whether the fear of nonimplementation drives judicial constraint. If the Court is at least partly constrained by a fear of nonimplementation, then the degree to which it is constrained should depend on its implementation power. Therefore, external constraint should be most prominent in important lateral cases because those are the cases in which implementation depends on public support.

I test my theory of a semiconstrained Court in two separate analyses. First, I evaluate the influence of public opinion and elite preferences on the ideological outcome of Supreme Court decisions. Second, I evaluate the influence of these external forces on the Court’s decision to invalidate federal statutes. I employ logistic regression models to evaluate the influence of public mood and congressional ideology on the justices’ final votes on the merits in vertical versus lateral cases. Each of these analyses confirms that external pressures exert stronger influence when nonimplementation is a concern.

I find that the fear of nonimplementation is a critical factor motivating the Supreme Court’s response to external pressure. Consequently, these external forces exert differential effects in different issue contexts. When deciding important lateral cases, the Court is highly constrained by external forces because it lacks the necessary implementation powers to give efficacy to its rulings in the absence of popular and/or elite support; however, when deciding vertical cases, the justices are relatively less constrained because their decisions tend to be implemented by lower-court judges regardless of external pressure. When the Court considers unimportant cases, the chance of strong public opposition is low; therefore, nonimplementation is unlikely and the justices can disregard external pressure. Although numerous scholars have found that the Supreme Court is constrained, I find that constraint is a significant factor in only a small subset of its docket.



U.S. Supreme Court Credit : OZinOH (Creative Commons BY NC)

My findings suggest that the U.S. Supreme Court is relatively independent when deciding cases related to criminal prosecution, civil liability, or judicial administration; however, the Court is more constrained when trying to alter policy beyond the control of lower courts, at least when those cases may potentially attract public interest. As a result, studies of judicial independence should be conscious of the varying institutional contexts surrounding cases in different issue areas. Rather than search for universal tendencies of Supreme Court behavior, judicial scholars should be attentive to differences in judicial power and independence across different contexts.

This article is based on the paper “[The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court’s Fear of Nonimplementation](#),” which appeared in the *American Journal of Political Science*.

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