WICKARD V FILBURN AND US V LOPEZ: TWO SIDES OF THE SAME COIN?

An Undergraduate Research Scholars Thesis

by

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ABSTRACT

Wickard v Filburn and US v Lopez: Two Sides of the Same Coin? (May 2013)

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The Supreme Court's commerce clause jurisprudence represents a balance between ideology and institutional constraints. In this work, I examine to what extent ideology and institutional constraints affect the Court's jurisprudence. As these cases often feature conflict between the states and the federal government, these cases also have important implications for federalism. Using an original dataset of all Supreme Court commerce clause cases from 1939-2012, the effect of ideology is examined, both as a whole and during individual Court "eras".

CHAPTER 1

INTRODUCTION

Recent scholarship in the field of judicial politics has emphasized the importance of motivating factors in understanding judicial behavior. One such factor, policy preferences, has been thoroughly outlined and rigorously tested with generally positive results (see, for example, Segal and Spaeth 1993, 2002, Pritchett 1941, Heck 1981, Banks and Blakeman 2012). While the results from this attitudinal model have been very powerful, some scholars have highlighted the need to consider other influences, including precedent and institutional constraints, in addition to attitudinal predictions (see, respectively, Kastellec 2010 and Clark 2011).

In this work, I seek to add evidence that precedent and institutional constraints do matter to justices. Beyond this, I seek to demonstrate that purely attitudinal models, though adept in some instances, suffer from a fatal flaw: namely, that many cases have conflicting policies at play. In cases where justices are pulled in different directions by these different policy dimensions, attitudinal predictions are theoretically unsound and empirically suspect.

Because this work focuses on the effects of precedent and institutional constraints, I examine the Supreme Court's commerce clause jurisprudence. The commerce clause has a number of important features which make it ideal for this study. First, commerce clause cases generally involve multiple policy dimensions (for example, a given case involves both an assessment of the policy and an assessment of the actor, whether federal or local, implementing the policy). In

cases where these different dimensions diverge, attitudinal predictions are unsound and fail to predict with any significant accuracy as the results demonstrate.

Beyond this, the commerce clause has a relatively clear precedent that has remained largely unchanged over time. Although no precedent has gone completely unchanged, the general trend has remained the same throughout its many eras: specifically, that the clause is to regulate and prevent states from imposing economic externalities upon the other states (Carrubba and Rogers 2003). Equally importantly, this precedent is fairly unambiguous as the Court can generally see such harms through the use of *amicus curiae* briefs. When many states petition the Court in opposition to a given policy, they send a clear signal that the policy does harm interstate commerce. Likewise, when many states support a given policy, the opposite signal is sent. This clear precedent allows a glimpse into the effect of precedent on court output.

As the following discussion will expand upon, I argue that attitudinal perspectives are incapable of explaining the Court's commerce clause jurisprudence. Instead, the Court uses signals sent from the federal government and state governments to ensure that negative externalities on interstate commerce are removed. Through the use of statistical analysis and classification trees, this work finds evidence that *amicus* briefs are significantly more adept at explaining judicial outcomes than traditional ideological concerns. Furthermore, this evidence supports the claim that the Court applies these signals in a manner consistent with commerce clause precedent.

This work consists of 5 sections. In Section II, I present a history of the commerce clause, tracing the growth of the commerce clause throughout history. In Section III, I expound upon the theory underlying this work. In Section IV, the methodology and results are presented. Substantive conclusions are developed in Section V.

CHAPTER 2

HISTORY

Origins and early years

Any adequate history of the Commerce Clause must begin several years before the clause was ever penned. Indeed, the origins of the commerce power stem in great part from the failed Articles of Confederation, the more decentralized precursor to our current Constitution. As Justice Stevens noted in the majority opinion in *Gonzales vs Raich*, the Clause was envisioned as a response to the inherent weakness of the Articles: that of economic Balkanization, in which states could issue their own currencies and impose trade barriers, greatly obstructing interstate trade (545 U.S. 1, 16). This problem was frequently addressed by various influential figures at the time of the adoption of the Constitution, especially in various Federalist papers. In Federalist 42, James Madison argued that without an overarching Federal commerce power, economic protectionism would inevitably lead to "unceasing animosities…and serious interruptions of the public tranquility." (Federalist 42). Likewise, Federalist 22 asserts that "there is no object…that more strongly demands a federal superintendence." (Federalist 22).

It was in this environment of economic warfare that the framers of the Constitution adopted Article I, Section 8, which includes, among other provisions, the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This newly found power created many questions for the fledgling government, especially in regards to state powers

with respect to commerce. Was this an exclusive grant of power to Congress and, if not, where did the boundaries lie?

The Supreme Court's first major step towards answering these questions came in *Gibbons vs Ogden*, in which the state of New York issued an exclusive grant of rights to the waterways in the state. Chief Justice John Marshall painted the Commerce power in a very broad light, providing that the power was limited not only to commercial transactions but also to regulations of navigation, a vital part of interstate regulation. Furthermore, dicta in the opinion suggested that the clause was to be understood in a "plenary" manner, "[acknowledging] no limitations other than are prescribed in the Constitution." (22 U.S. 1, 196-7). At the same time, however, a distinction was made between interstate commerce and "the purely internal commerce of a State." (*Id.*, at 204). This distinction between interstate commerce and intrastate commerce represented the first of many such distinctions in the Commerce Clause jurisprudence.

Interestingly, the Court began to move away from the broad understanding of the commerce power espoused in *Gibbons* relatively quickly. In *Cooley vs Board of Wardens*, for example, a regulation requiring the hiring of a local pilot to enter or leave Philadelphia was upheld despite the obvious effects on navigation, an interstate issue. Instead, the Court suggested that the Congressional power was "compatible with the existence of a similar power in the states", indicating that commerce could be regulated by states as long as Congressional action did not preempt such regulations. (53 U.S. 299, 318). Similarly, *Munn vs Illinois* allowed states to regulate, among other things, warehouses which are used by others engaged in interstate commerce. These cases and others outlined a "negative implication" of the Commerce power, the Dormant Commerce Clause, which allowed certain state regulations on interstate commerce to pass Constitutional muster.

The *Gibbons* decision also raised a significant question about defining exactly what "internal commerce of a State" was. Decisions like *Munn* highlight the close proximity between interstate and internal commerce. In that case, the warehouses themselves were internal commerce, even though they were frequently used by interstate companies and the regulations "may indirectly operate upon commerce outside its immediate jurisdiction." (94 U.S. 113, 135). By contrast, *Hall vs DeCuir* extended federal control to preempt legislation regulating the presence of blacks and whites within the same ship cabin as a result of its effects on transportation among states.

E.C. Knight and the current of commerce

In an effort to resolve such questions, the Court moved to a new standard, in which some activities, like transportation, were interstate, while others, like manufacturing, were necessarily internal commerce. This theory focused chiefly on the type of economic activity taking place. In *Kidd vs Pearson*, for example, the manufacture of alcohol did not qualify as interstate commerce until it had "been shipped or entered with a common carrier for transportation to another state" (12 U.S. 1, 25). Likewise, in *United States vs E.C. Knight Company*, a monopoly in manufacturing alone was not sufficient to prove that such a monopoly obstructed interstate commerce. Under this more formalistic theory, Congress could only regulate those goods which has entered interstate commerce.

In *Kidd*, then, states could prohibit the manufacture of goods within their state, but regulations regarding the importation of such goods might not pass Constitutional muster. Similarly, in *E.C. Knight*, had the Sherman Antitrust Act been used to control the distribution, rather than the production of goods, the results may have differed. This theory offered a straightforward (if

somewhat unsatisfying) means of separating internal from interstate commerce and determining where Congressional power extended.

However, flaws soon became apparent in cases like *Swift and Co. vs United States*, when the Court struggled to differentiate the sugar monopoly in *E.C. Knight* from other monopolies. Although the Court admitted that the two cases "are near to each other", the antitrust actions in *Swift* were ultimately upheld as a result of their focus on sales and distribution rather than the manufacture of goods, a distinction that ultimately raised more questions than answers (196 U.S. 375, 396). Nonetheless, the *Swift* approach, also known as the "current of commerce" theory, was adopted and used in cases like *Stafford vs Wallace*, regulating meat stockyards as a vital choke point through which the interstate meat trade must pass. This approach provided Congress with the power to not only regulate good crossing state lines, but also extended to those activities that served as vital stops in this current of commerce. Adoption of this approach resulted in the minimization, though never outright abandonment, of the decision in *E.C. Knight* over the subsequent decades.

The *Lochner* era

This more expansive definition of commerce was greatly narrowed during the *Lochner* era, a period in Court history where the Court took a staunch stance in favor of free markets. Although this era applied primarily to equal protections and due process concerns, there was certainly spillover into the realm of the Commerce Clause. Although Congress was allowed to regulate so-called "societal evils" like lottery tickets and alcohol in interstate commerce (see *Champion vs Ames)*, the Court struck down many regulations like child labor laws.

In *Hammer vs Dagenhart,* the Court struck down a law prohibiting the interstate trade of goods produced with excessive child labor, holding that such a law exceeded Congressional power to regulate commerce. In one of the relatively few Court opinions to ever be explicitly overruled, the *Hammer* court distinguished the production of cotton, even cotton produced by child labor, from the societal evils described above. According to the *Hammer* Court, because the production of cotton itself was not immoral and the Court had previously held production to be outside Congressional purview, the regulation in question could not be upheld.

The new deal

Of course, it takes little awareness to see that child labor is now largely illegal, a change that came about largely as a result of the expansive understanding of the Commerce Clause which marked the New Deal era. In an effort to reverse the damage done by the Great Depression, President Roosevelt signed into law numerous pieces of legislation intended to regulate interstate commerce. These broad pieces of legislation set up significant conflicts between the Court and the President, best illustrated by the (perhaps apocryphal) stories of the Court's sudden "switch" in response to the threat of a court-packing scheme proposed by Roosevelt himself.

Regardless of the historical accuracy of the switch, the Court did initially position itself as an opponent to much of the early New Deal legislation. *Carter vs Carter Coal Company* struck down regulations of labor practices and pricing schemes for the coal industry, relying on the distinction between production and sales in *E.C. Knight. Schechter Poultry Corp. vs United States* similarly struck down regulations on the poultry industry due to Schecter's almost complete reliance on intrastate rather than interstate commerce. Because any effects on interstate commerce would be minimal and indirect, the Court disposed of the regulations.

Over time, however, the Court began to signal a clear shift away from such rigid and limited definitions of interstate commerce, moving instead to the standards proposed in *National Labor Relations Board vs Jones and Laughlin Steel*. *Jones* largely abandoned both the "current of commerce" theory as well as the distinction between production and distribution. Instead, the Court defined Congressional reach to include any activities which were likely to burden or obstruct interstate commerce. Thus, even labor disputes at a single production facility, the issue in *Jones*, could fall within interstate commerce as long as some burdensome effect resulted.

The shift became even more apparent in *United States vs Darby*, in which the Court unanimously overturned *Hammer,* condemning its "departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision." (312 U.S. 100, 116-7). The Fair Labor Standards Act, which set, among other things, a minimum wage which had been rejected by previous Courts, was upheld as a valid regulation of interstate commerce.

Finally, in *Wickard vs Filburn*, the Court offered what many have called the most expansive view of the Commerce Clause in history. In *Wickard*, the Agricultural Adjustment Act was upheld, imposing a tax on all farmers who grew more than their allotted quota of wheat. Surprisingly, however, the Act was enforceable even against individual farmers who disposed of the wheat not by the market mechanism but by simply feeding it to their animals. In the opinion, the Court strongly rejected the notions of direct and indirect effects and local activities, which were dismissed as "a few dicta". (317 U.S. 111, 119). The Court also rejected the formulaic approaches of the past, stating that "a review of the course of decision under the Commerce Clause will make plain…that questions of the power of Congress are not to be decided by

reference to any formula." (*Id.* at 120). In the *Wickard* decision, observers could see all of the various shifts which came about during the New Deal era.

Civil rights and interstate commerce

This expansive understanding of the Commerce Clause continued to be utilized several decades later, as the Civil Rights Act of 1964 and other legislation sought to force racial equality onto otherwise reticent businesses. In both *Katzenbach vs McClung* and *Heart of Atlanta Motel vs United States*, the Court unanimously upheld the Civil Rights Act, prohibiting both restaurants and hotels from engaging in racial discrimination with regards to their customers.

In both cases, the substantial effect on interstate commerce necessary was satisfied as a result of their proximity to and reliance on interstate trade. Both establishments were located near interstate highways, and the Congressional record showed evidence "that this…discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community." By this point, decades had passed since the commerce clause had been restricted by the Court, and scholars and jurists alike began to conclude that the Commerce Clause had grown into a virtually unlimited source of Congressional power.

Modern commerce clause jurisprudence

Of course, as recounted in the introduction, such conventional wisdom was shattered with the decision in *United States vs Lopez,* which limited the Commerce power for the first time in decades. While not abandoning the approaches of the New Deal and Civil Rights-era Courts, the *Lopez* decision drew a novel distinction between "economic activity" and, implicitly, noneconomic activity like the possession of a handgun in a school zone. Although possession of

a handgun may in fact have an effect on interstate commerce, the Court held, such possession was not economic activity. Therefore, Congress exceeded its powers in passing the GFSZA.

Similar logic was employed in *United States vs Morrison* five years later. Although Congress presented voluminous records demonstrating a link between domestic violence, the Court again found that domestic violence is noneconomic in nature and struck down the Violence Against Women Act. In so doing, the Court sent a clear signal that this economic activity distinction was more than passing dicta, but questions still remained regarding the impact of this distinction. It seemed straightforward that roadside hotels and ship travel would qualify as economic activity, but what of growing wheat or engaging in labor disputes? Neither issue lent itself to clear categorization under this new distinction.

The Court's decision in *Gonzales vs Raich* in 2005 strongly suggested that older precedents like *Wickard* continued to be good law despite recent doubt. In fact, the inherent similarities between *Raich* and *Wickard*, which both focused on individuals growing commodity crops, led the Court to employ a close parallel to the logic of its predecessor sixty years before. This tantalizing glimpse into the ramifications of this new distinction, though important, will nonetheless need to be refined further to understand exactly what *Lopez* and *Morrison* meant to the Commerce Clause jurisprudence.

CHAPTER III

RESEARCH QUESTION

The attitudinal model

Since Segal and Spaeth's (1993, 2002) seminal work on the attitudinal model, the question of policy preferences has been an important component of judicial politics. For attitudinalists, judges operate in much the same way as other political actors: specifically, they seek to decide cases in a manner consistent with their policy preferences. Thus, conservative judges decide cases in a conservative manner, while liberal judges do the opposite. This intuitive model finds support in a number of works, including (Segal and Cover 1989, Brisbin 1996, Hagle and Spaeth 1991, 1993). While some scholarship suggests that ideology is the predominant factor (see Unah and Hancock 2006, Spaeth and Segal 1999, Rohde and Spaeth 1976), others envision ideology as one factor among many (see Bartels 2009, Collins 2008, Lindquist and Klein 2006).

How would an ideologically driven Court address commerce clause cases? Two possibilities exist. Many measures of judicial ideology, including the Supreme Court Database, classify commerce clause decisions as conservative if they are decided in favor of the states and liberal if they are decided in favor of the federal government. This can lead to some questionable classifications. For example, *Perez vs United States* is classified as a liberal decision despite upholding a conviction (traditionally a conservative ruling). Likewise, *United States vs Lopez* is classified as a conservative decision despite reversing a conviction.

On the other hand, it is possible that conservative justices vote against regulations from either the federal or local governments. This classification scheme is able to intuitively classify both cases above. Thus, are justices primarily concerned with the content of the law, or with the level of government which passed the law?

A priori, it is impossible to determine whether schemes like those used in the Supreme Court Database are accurate or not. In order to test which is more accurate, we can test Hypotheses 1 and 2.

Hypothesis 1: As judges become more liberal, they are more likely to support federal action and to oppose state action. As judges become more conservative, they are more likely to support state action and to oppose federal action.

Hypothesis 2: As judges become more liberal, they are more likely to support regulatory action from either the federal government or the states. As judges become more conservative, they are less likely to support regulatory action from either level.

The legal model

Some social scientists, and many legal scholars, emphasize the importance of legal factors like precedent on judicial outcomes (see Clark 2013, Gilman 1999, 2001, Kahn 1999). Although the commerce clause has gone through a number of different tests and eras, a number of scholars have noted that these tests all contain the same core concern: removing impediments to interstate commerce (see Bork and Troy 2001, Dowling 1940). While these impediments are generally associated with state action (for example, *Bibb vs Navajo Freight Lines*), the Court has also struck down federal regulation that is beyond the scope of the federal government (for example, in *United States vs Lopez* and, more recently, *National Federation of Independent Businesses vs*

Sebelius). Although the tests may have changed, the principle behind the tests has been fairly consistent.

How then does the Court know when a burden to interstate commerce exists? In this paper, I propose that the Court uses the presence of *amicus* briefs to indicate when a law is harmful. The filing of an *amicus* brief is a costly endeavor, requiring significant amounts of effort. Because these briefs are not simple cheap talk but instead a costly signal, the Court can use these to indicate when laws are sufficiently harmful as to burden interstate commerce. A brief from either the states or the federal government sends a clear signal that the law in question is imposing significant economic costs and needs to be struck down. For federal regulations, the same principle applies. When states choose to oppose a federal regulation, they are signaling that Washington is overstepping its bounds and harming interstate commerce.

Importantly, this measure of harm comports perfectly with the Court's traditional test in dormant commerce clause cases. For dormant commerce clause cases, the Court has traditionally employed a balancing test to determine whether the state's benefits clearly outweigh the harms to interstate commerce (see *Pike vs Bruce Church* and *Kassel vs Consolidated Freightways Corporation*). Thus, incidental harms are not unconstitutional. Instead, it is only when those harms are substantial that the Court becomes concerned. As *amicus* briefs are unlikely to be filed for mere incidental harms, this test comports with the use of *amicus* briefs as a signal to the Court.

If these precedents are an important factor in the Court's decision-making process, we should expect to see laws struck down with greater frequency if other governmental actors signal opposition to the law. This leads to Hypothesis 3.

Hypothesis 3: The presence of one or more *amicus* briefs from other governmental actors opposing a law should decrease the likelihood of the law being upheld.

Scholarship also suggests that state regulations face a substantially higher burden of proof than federal regulations. (see Denning 2008, Farber and Hudec 1994, Tushnet 1979) While federal regulations must generally withstand only rational basis review. For example, the Court held in *United States vs Lopez* that the Court has "undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." By contrast, local regulations must generally withstand a more heightened level of scrutiny. Laws which do not discriminate against interstate commerce must still withstand the above balancing test, while laws which have a discriminatory purpose or effect are considered under strict scrutiny, the Court's most exacting standard.

If precedent is an important factor, we should expect to see federal regulations upheld at a higher rate than state regulations. This leads to Hypothesis 4.

Hypothesis 4: Ceteris paribus, the Court should be more likely to uphold federal regulations than state regulations.

Unifying these two models

The next important step is to develop a way of testing both of these models into one consistent model. Specifically, it is important to detail how a Court might act if they are motivated by both ideology and precedent. For a Court which values both ideology and precedent, justices are likely to be confronted with cases in which ideology and precedent pull them toward different outcomes. In these cases, a number of possibilities exist. Justices might simply adhere to ideology or precedent exclusively and rule in that manner. However, they might also engage in a

more nuanced process, where they balance their interests. A liberal justice, for example, might be unwilling to strike down a given law, while they would be willing to do so if there was evidence of interstate harm. In this way, the justice's final position in the policy space is a mix of ideological and precedential concerns.

While it seems likely that each justice might engage in different processes, where some value ideology, some precedent, and some fall in between, this work does not seek to answer that question. Future iterations in which the unit of analysis is the justice vote rather than the case outcome may be able to shed more light on this question.

Nonetheless, through this operationalization of precedent, both models can be tested at the same time. By analyzing the effects of precedent, ideology and any interactions between the two, both of these models can be empirically tested.

CHAPTER IV

MEASURES AND EMPIRICAL RESULTS

Dependent variable

In this section, we test the above hypotheses. The data used is drawn from all Supreme Court commerce clause and dormant commerce clause cases from 1937-2012, a total of 188 cases. The unit of analysis is the case.

My dependent variable, *For Action*, is a measure of the outcome of a given case. If the Court rules to uphold a regulation, regardless of the origin of the regulation, this variable is coded as a 1. If the Court strikes down a regulation, this variable is coded as a 0.

Note that these measures do not address the nature of the regulation. For example, pro-business and pro-union regulations are both judged on one characteristic: whether the regulation was upheld. Importantly, these values are significantly different from outcome-based measures used elsewhere, including the Supreme Court Database, because of this emphasis, avoiding problems of endogeneity.

Independent variables

In order to test attitudinal predictions, the first independent variable, *Ideology*, is a measure of a justice's policy preferences. Drawn from the Martin-Quinn ideology scores, I use the median member to determine the Court's overall ideology (see Martin and Quinn 2002 and Martin, Quinn and Epstein 2005). Although these are vote-based scores, they rely on the traditional

liberal/conservative dichotomy rather than the more specific measure used here. Although endogeneity is an unavoidable problem, this distinction should make the problem minimal.

The variable *Local Action* is a simple measure of the source of the law at issue. For cases involving local regulations, this variable is coded as a 1. If the case involves federal regulation, this variable is coded as a 0.

In order to test the precedential model, I use four variables, drawn from the *amicus* briefs and counsel arguing before the Court. *Federal Conflict* is coded as a 1 in cases where the federal government opposes one or more local governments (through either *amicus* briefs or counsel) and a 0 otherwise. *Federal Support* is coded as a 1 in cases where the federal government sides with one or more local governments and a 0 otherwise. *Local Conflict* is coded as a 1 in cases where one or more local governments oppose another local government and a 0 otherwise. *Local Support* is coded as a 1 in cases where one or more local governments side with another local government and a 0 otherwise.

To illustrate these variables, consider a few landmark cases. In *United States vs Lopez,* both *Federal Conflict* and *Federal Support* would be coded as a 1 as states filed *amicus* briefs both supporting and opposing the GFSZA. In *Bibb vs Navajo Freight Lines, Local Conflict* would be coded as a 1 because states filed *amicus* briefs opposing the Illinois law. In *South Carolina State Highway Department vs Barnwell Brothers,* both *Federal Conflict* and *Local Support* are coded as a 1, as the federal government opposed South Carolina while other local governments supported South Carolina.

As the results section explains, these can be condensed into two broader variables, *Conflict* and *Support. Conflict* is coded as a 1 if either *Federal Conflict* or *Local Conflict* are coded as a 1, and

a 0 otherwise. *Support* is coded as a 1 either *Federal Support* or *Local Support* are coded as a 1, and a 0 otherwise.

These variables have direct roots in precedent. Preparing and filing an *amicus* brief is a costly endeavor, so a brief opposing a regulation signals to the Court that significant harms exist as a result of the regulation in question. Because the commerce clause is a tool to remove harms from interstate commerce, this signal should lower the likelihood of success, regardless of the source of the regulation or opposition. The opposite is true for briefs supporting a regulation. Such action communicates that the regulation in question benefits interstate commerce and need not be removed, a valuable signal.

As a final point, the use of *amicus* briefs and counsel was selected because of the unambiguous and predictive nature of these measures. As scholars have noted regarding various jurisprudential elements, justices have the discretion of citing favorable factors while omitting unfavorable factors (see Fowler et al. 2007, Fowler and Jeon 2008). Thus, it is possible, for example, that justices looking to rule in favor of a local regulation might not mention the externalities imposed in their opinion. However, they cannot hide the *amicus* briefs indicating these harms. *Amicus* briefs and participation offer a clear, reliable and replicable signal of interstate externalities.

The value of precedent

I begin by examining the effect of precedent on commerce clause jurisprudence. I present the results for model 1 and model 2 in Table 1.

Model 1 presents a simple view of commerce clause precedent. In this model, both *Federal Conflict* and *Local Conflict* are combined into one indicator variable, *Conflict*. The same process

was done for the variable *Support*. Conflict has a substantive and statistically significant effect on the likelihood of a decision supporting a regulation.

Beyond this, local and federal actions are treated in a fundamentally different manner, with the burden of proof significantly higher for local actions. There is a clear and statistically significant presumption against local regulation relative to federal regulation. This finding confirms that federal regulations are more likely to pass constitutional scrutiny.

Model 2 presents the same precedent analysis but does not combine the conflict and support variables. As Table 1 indicates, not all conflict is equal. Instead, *Federal Conflict* remains substantively and statistically significant, while *Local Conflict* does not reach statistical significance. Neither support variable reaches significance.

This is a surprising finding. Although scholars have framed the commerce clause as protection from the states for the states (see Smith 1986, O'Grady 1997), this seems to suggest that the critical issue is one of federalism. There is only a significant effect in cases where the federal government opposes a local regulation or vice versa: local governments opposing one another shows little effect.

Even more surprisingly, neither support variable is significant. While support from other governmental actors might be expected to increase the likelihood of success, these data show no statistical or substantive effect of briefs written in support of a regulation. While the source of this surprising finding is unclear, it may be the case that states have a sort of economic *quid pro quo*, where both support policies that are advantageous for each (i.e. states with major ports support licensing restrictions passed by ports in other states). Nonetheless, this is a finding in need of explanation.

Overall, this data largely confirm the expectations drawn from legal scholarship. The Court's decisions present strong evidence that local actions are judged under a higher standard than federal actions. In addition, the Court clearly uses the conflict between local and federal governments as a signal indicating harm to interstate commerce.

Precedent and ideology

In Table 2, I present results when ideology is included in the analysis.

Importantly, *Ideology* is statistically significant, as is *Conflict* and *StateAction.* When *Conflict* is split, as above, the same effect is observed. In order to test whether local action is treated differently by conservative or liberal courts, Model 5 includes an interaction term between *Ideology* and *Local Action*. Figure 1 presents the predicted probability of success for local and federal actions across ideological scores. The clear downward trend indicates that increased conservatism decreases the chance of success for both federal and local action. In contrast to claims by conservative pundits (see Ladd 2012, West 2012), conservatives do not oppose federal regulations; instead, they appear to oppose *all* regulations.

Figure 2 illustrates the total effect of precedent by comparing federal action without conflict to local action with conflict across ideological scores. As above, the presence of conflict lowers the likelihood of success significantly, in line with precedent. These two factors alone can decrease a law's chance of survival by more than 50%, emphasizing the importance of precedent. Overall, these results support an understanding of the commerce clause which considers both ideology and precedent. Both effects are substantively and statistically significant, suggesting that justices are not single-minded policy seekers: instead, they look to move toward their preferred ideology while constrained by precedential considerations. Overall, these models are fairly successful at

correctly classifying cases. Without any information about the law or other interested actors (perhaps industry *amici*), the models are able to reduce error by 15-18%.

Jurisprudential regimes

Finally, I examine evidence for different eras of commerce clause jurisprudence. Table 3 presents regressions for two commonly noted "shifts" in commerce clause jurisprudence: *Wickard vs Filburn* and *United States vs Lopez*. Indicator variables at these shifts are not statistically significant in either model, and the coefficients are similarly signed (and, in fact, close to identical) in both models. Despite the voluminous literature documenting the different jurisprudential regimes governing after *Wickard* and *Lopez*, the data show little evidence that the Court is weighing these standards differently in either time period.

CHAPTER V

DISCUSSION AND CONCLUSIONS

The struggle to distinguish legal factors from attitudinal ones has been a significant concern in modern judicial politics. Contrasting works have yielded very different explanations for the same decisions, and much of the work emanating from the legal academy remains largely unutilized by social scientists (and vice versa).

This work attempts to bridge this gap, unifying legal scholarship and social science principles into one consistent model. This model more accurately reflects the decisions that judges make: though they might like to decide cases based solely on attitudinal considerations, decisions are constrained by precedential factors. By incorporating both factors into one model, both models can be empirically tested and can begin to "speak" to one another.

Testing this model largely confirmed both lines of scholarship. While the fact that states opposing other states has no effect is puzzling, these results strongly support claims stemming from the legal academy that conflict does matter and that states face higher burdens. In short, the tests laid out by the Court are more than mere dicta. Importantly, these results hold across ideological lines, suggesting that judges are tempering their own ideological preferences to more closely match precedent.

This work leaves ample room for further study. Expansion of this type of modeling to other areas of jurisprudence will be helpful in determining to what extent legal factors matter. In addition, I hope to extend this work to model individual justice votes rather than simply case outcomes.

Some justices might be more swayed by precedent, while others might be more influenced by policy preferences, so individual modeling will allow a deeper glimpse into exactly why the Court acts the way it does.

Table 1: Logit Estimation for Various Precedent Factors

	Model 1	Model 2
Conflict	-1.0398*	
	(0.3855)	
Support	0.2491	
	(0.3562)	
Local Action	-1.5769**	-1.3959**
	(0.4572)	(0.4785)
Federal Conflict		-0.7642
		(0.4218)
Federal Support		0.6558
		(0.7288)
Local Conflict		-0.8641
		(0.6424)
Local Support		0.1631
		(0.3823)
Constant	1.7495	1.5327
	(0.4457)	(0.4541)
Log Likelihood	-122.42	122.392
PRE	10.86%	10.38%
N	191	190

Table 2: Logit Estimation for Precedent and Ideology

	Model 3	Model 4	Model 5
Conflict	-1.085*		-1.0625**
	(0.4026)		(.3977)
Support	0.4465		.4114
	(0.375)		(.3799)
Local Action	-1.7741**	-1.5686**	-2.6755**
	(0.4752)	(0.4892)	(.9206)
Federal Conflict		-0.7257	
		(0.4299)	
Federal Support		0.7712	
		(0.7449)	
Local Conflict		-1.0493	
		(0.7272)	
Local Support		0.3734	
		(0.4003)	
Ideology	-0.6902*	-0.7146*	-2.5226*
	(0.3019)	(0.3022)	(1.3138)
Ideology*Local Action			2.0411
			(1.3586)
Constant	1.7495	1.5327	3.0394
	(0.4457)	(0.4541)	(.9240)
Log Likelihood	-117.017	-116.825	-116.3497
PRE	16.77%	18.79%	14.51%
N	188	188	188

Table 3: Logit Estimates for Various Jurisprudential Regimes

	Model 5	Model 6
Ideology	-0.1904	-0.6181*
	(0.3814)	(0.296)
Conflict	-0.8859*	-0.9536**
	(0.3900)	(0.3902)
State Action	-1.6109**	-1.6442**
	(0.4504)	(0.4583)
Pre-*Wickard*	1.1636	
	(0.6722)	
Post-*Lopez*		-0.1861
		(0.513)
Constant	1.7038	2.0402
	(0.4881)	(0.4764)
Log Likelihood	-116.148	-117.675
PRE	13.36%	10.84%
N	188	188

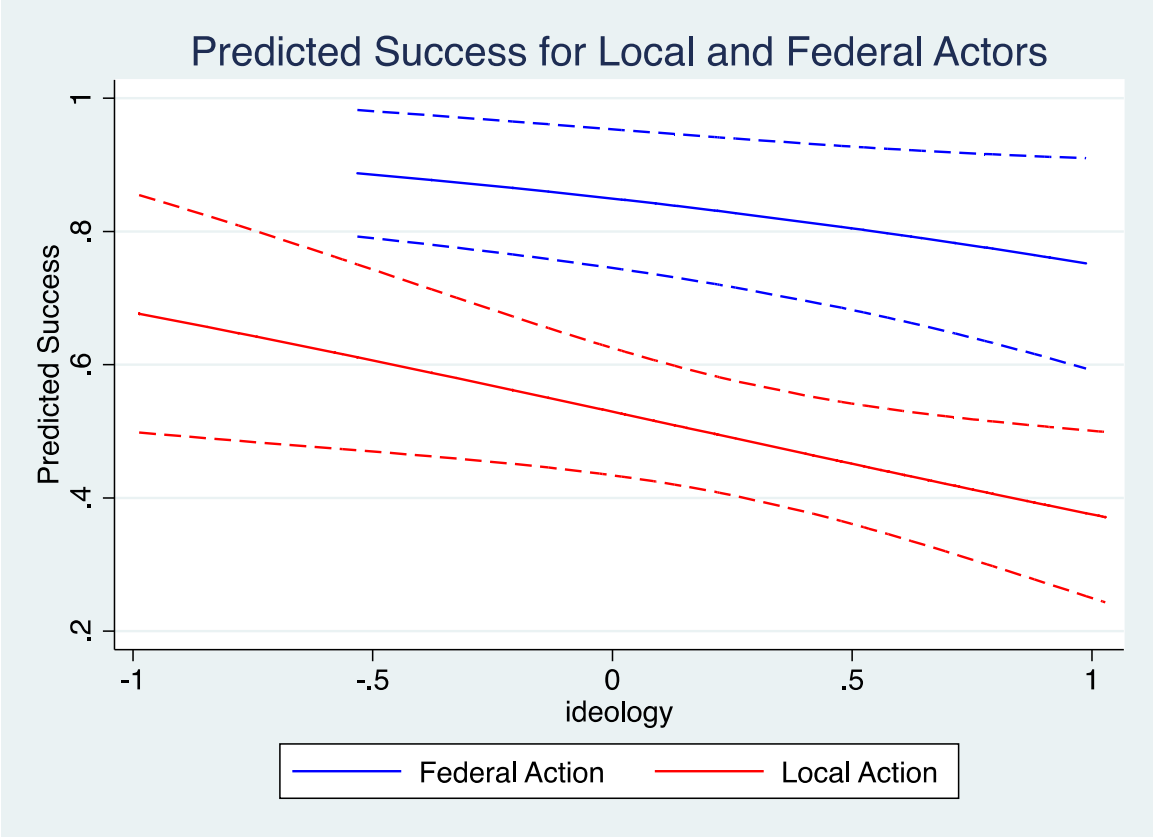

Figure 1: Predicted Success for Local and Federal Actors

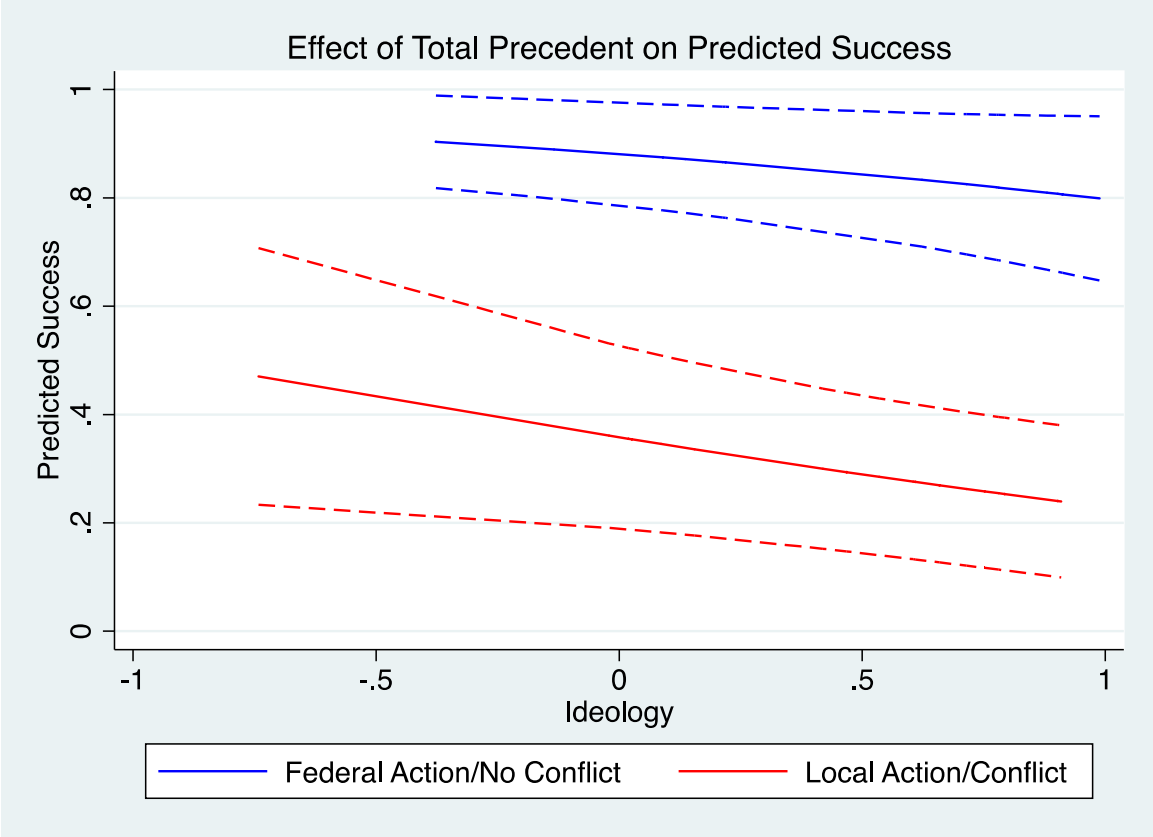

Figure 2: Effect of Total Precedent on Predicted Success

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