Journal of Law, Economics, and Organization Advance Access published December 4, 2015

Congressional Assertions of the Spending Power: Institutional Conflict and Regulatory Authority

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This study seeks to answer a crucial and unexplored question about American regulatory law and policy: How do majority coalitions in Congress use the spending power to circumvent intra-branch conflict and judicial constraints against regulating by finding alternate avenues to regulate states and private actors? This study provides the first large-scale empirical evidence of congressional use of the spending power to assert implementation authority in the face of constraints against more direct legislating. It is through this process of conditioning funds upon regulatory compliance that Congress works toward ideal policy outcomes without inciting institutional conflict with the other branches or from the opposing party. I base my conditional spending analysis on data on statutory specificity and congressional delegation from the 80th to the 110th Congresses provided by Farhang, and include additional measures of institutional conflict. The above argument is supported by the empirical analysis. (*JEL* K20, K23)

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1. Introduction

On April 26, 1995, five years after the enactment of the Guns-Free School Zones Act (GFSZA) of 1990, in which Congress assessed criminal penalties for gun possession within 1000 feet of schools, the Supreme Court held in its landmark 5–4 ruling of *United States v. Lopez* (514 US 549, 1995) that Congress's regulation of guns in school zones transgressed its regulatory powers under the Interstate Commerce Clause. This holding was particularly striking, as it was the first time in 60 years that the Supreme Court declared that Congress exceeded its regulatory authority under the Commerce Clause, traditionally afforded judicial deference and giving Congress ample latitude in regulating both interstate and intrastate activities. President Clinton immediately expressed his ardent disapproval of the Court's *Lopez* holding, echoing his staunch support for Congress's

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The Journal of Law, Economics, and Organization, Vol. 0, No. 0
doi:10.1093/jleo/ewv030

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working to ban guns in school zones in a way that the Court would deem constitutional, saying that "Congress could encourage states to ban guns from school zones by linking Federal funds to enactment of school-zone gun bans. At least we could tie the money we have for safe schools to such a ban." After initially re-drafting the legislation to clarify Congress's regulation within the domain of commerce, Congress adopted Clinton's suggestion of regulating by way of conditioning federal education funds on the enforcement of guns-free school zones, in both the Education Excellence for All Children Act of 1999 and the No Child Left Behind Act of 2002.

Despite seeking only different enforcement mechanisms to achieve the same policy as that in the GFSZA of 1990, this alternate regulatory strategy has not generated any constitutional challenge, and the legislation remains intact. Thus, its shift to the spending power mechanism enabled Congress to return successfully to its original goal of regulating guns-free schools. The notion that Congress may be barred from imposing statutory provisions under the Commerce Clause—a dominant justification for much sweeping post-war regulation, from criminal to social and environmental policy—but nevertheless be permitted to do so under its power to tax and spend, is the subject of this paper's inquiry.

This article raises a crucial and unexplored question about American regulatory law and policy: How do majority coalitions in Congress use their spending power to circumvent intra-branch conflict and judicial constraints against regulating by finding less direct avenues to regulate states and private actors? The conventional wisdom is that the majority of the Court's statutory interpretations are not sufficiently salient or large in scope to elicit congressional responses, given the costly effort required to take legislative action. This article instead raises the possibility that while direct challenges to the judiciary may indeed be rare, Congress *has* pursued alternate mechanisms toward the policy goals hampered by the courts. It seeks to demonstrate how legislative-judicial conflict and intra-branch conflict drive coalitions in Congress to craft spending power policy enforcement when more direct regulatory avenues—such as the creation of a broad administrative apparatus—are foreclosed. Analyzing this use of the spending power, the article uncovers a previously unexplored mechanism of congressional regulation in the face of heightened legal and partisan conflict. And while these congressional acts of regulatory power when Commerce Clause regulation might be foreclosed can certainly provoke questions of federalism—and below I compare this strategy in the context of state and private regulation—this strategy applies far more broadly than regulation of state conduct and extends to a wide range of domestic regulatory behavior by Congress.

The case of regulating guns-free school zones is but one of many instances in which Congress worked successfully to shift enforcement strategy to achieve implementation goals otherwise foreclosed.[1] At the time

1. More recently, in *National Federation of Independent Business v. Sebelius* (567 US–, 2012), the Supreme Court upheld the Patient Protection and Affordable Care Act under

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that Congress turned to its spending power authority to regulate gun possession within school zones, the Supreme Court had expressly prohibited direct regulation under Congress's Commerce Clause authority. Moreover, the Congress in power held its majority status in Congress by a narrower margin, thus necessitating greater compromise and legislative bargaining in order to achieve legislative passage. This political climate thus typifies the setting in which we would most expect Congress to regulate via its spending power, a strategy that I argue has been under-studied and is increasingly relevant given the high levels of partisan conflict in the separation of powers system that we observe today.

To be sure, a number of additional avenues can be taken to constrain the policies of the other branches. I focus here on the choice of Commerce versus Spending Clause regulation given the salient judicial cases that addressed the congressional choice of this strategy and that in some cases reined in Commerce Clause authority. Given these constraints, I examine congressional shifting of its enforcement agenda, but recognize that it is but one venue in which these separation of powers conflicts unfold.

When drafting legislation, Congress has a menu of options from which to choose in assigning enforcement mechanisms for the policy it seeks to pass. It can empower administrative agencies to promulgate rules that fill in the details of policies. It can delegate potentially vast administrative authority to hold adjudications and issue sanctions for violations of the statute. It can mobilize private litigants to enforce their rights in court (Farhang 2010). And as I demonstrate below, it can regulate more indirectly (though still powerfully) by way of its spending power. Should legislators use an enforcement policy less forceful than Commerce Clause expansion of the administrative state, the range of movement from the status quo policy may widen. I argue that despite the marked effects of withholding federal funding, legislation using this mechanism is easier to pass under the radar—thus inciting less separation-of-powers conflict—because it does not create or extend a sweeping administrative apparatus, rather providing simply that funding is contingent upon compliance with regulatory provisions.[2] I refer to this phenomenon as *spending power regulation*.

I confine my analysis to the conditioning of funds to "command and control" states and private actors with strict prohibitions or requirements to comply with certain public policies, rather than including the broader patterns of appropriations and grants-in-aid in which Congress may simply specify broad eligibility criteria without clearly seeking to shape

Congress's power to tax and spend, despite the Act's not being a proper use of Congress's Commerce Clause authority.

2. Reliance upon less direct regulatory strategies to strengthen compliance with matters of social policy can be found in other cases as well, such as the compromise of private enforcement in Title VI of the Civil Rights Act, which would ultimately prove to be a tool potent for enforcing claims of discrimination.

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behavior (see Appendix A for a more detailed discussion of the coding). However, this regulatory strategy is importantly related in that both this article and the appropriations literature find there to be greater ease of passing policy through the appropriations process than through stand-alone legislation. MacDonald (2010), for example, finds that limitations riders in appropriations bills enable Congress to exercise substantial influence over bureaucratic decision-making even in spite of certain limitations on congressional ability to control policy that has been delegated (see, e.g., Volden 2002; Shipan 2004).

This article presents the first large-scale empirical findings of conditional spending regulation across time. I begin by discussing previous scholars' treatment of spending power regulation, and then move on to outline my hypotheses regarding congressional use of the spending power. The following sections discuss the empirical models with which I test these theories. The main models and a number of robustness checks below provide strong support for the claim that congressional coalitions turns to the spending power when facing judicial constraints against direct public policy implementation, as well as support for the hypothesis that they turn to this strategy more amid heightened intra-branch conflict and less often amid electorally precarious conditions.

2. Studies of Spending Power Regulation

An expansive literature has sought to explain the persistence and nature of congressional oversight and structural constraints of executive branch actors engaged in policymaking the American separation of powers system (see, e.g., McCubbins et al. 1987; Moe 1989).[3] Although this project engages with a rich political science literature on institutional conflict in policy regulation, it provides the first empirical study of congressional use of the spending power under conditions of only limited latitude to regulate. Although addressing the broader context of appropriations—not necessarily as a behavior control mechanism—Schickler finds that when Congress faced President Nixon's encroachments on Congress's regulatory capacity, it sought to "provide its own mechanisms for coordinating revenue and spending decisions" (2005: 55), providing preliminary evidence of Congress's attention to spending strategies amid contentious political climates.

In passing legislation, Congress faces two key challenges: first, the protection of its prerogatives as an institution that interacts frequently with the other branches; and second, the accomplishment of its substantive agenda as a partisan body with often conflicting policymaking goals. Not only is there conflict between majority and minority parties, but

3. Studies of congressional oversight and procedural constraints emphasize congressional control of the executive branch, whereas my focus here is on coalitions' relationship with the judiciary and opposing congressional coalitions.

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political pressures arising from constituencies can easily result in fragmented coalitions that hamper policy movement. While these are distinct political pressures and draw on different literatures on Congress (e.g., Krehbiel 1998; Schickler 2001; Cox and McCubbins 2005), I argue that both of these constraining factors drive Congress to shift its *enforcement strategy* rather than the policy location on a left-right continuum, in turn conditioning federal funds upon regulatory compliance. That is, faced with a judiciary limiting Commerce Clause policy regulation, Congress may choose to not *mandate* compliance with statute, but rather to provide that federal funds are contingent upon compliance with the policy foreclosed previously.

While a burgeoning literature has sought to understand better the incidence and timing of congressional responses to the judiciary (e.g., Hettinger and Zorn 2005; Clark 2011), scholars have been constrained by the infrequency of direct legislative attempts to constrain courts.[4] Moreover, the existing literature on congressional use of conditional spending regulation has largely been case-specific, a deficit that this study seeks to correct. The rare quantitative analysis of similar behavior was conducted by MacDonald (2010), who examines the use of limitation riders to prevent federal agencies from spending money toward certain ends, and finds that congressional majorities have previously underappreciated leverage over bureaucratic policymaking by employing this tool. Of course, his study is aimed at understanding congressional control of bureaucratic decisions, a rather separate question from this paper's inquiry into circumvention of potentially quite explicit regulatory constraint through provisions aimed at private individuals and states rather than the bureaucracies themselves. His thorough analysis of limitation riders unveils the marked extent to which Congress is in fact able to preclude agency spending toward certain ends and thus is more a study of agency responsiveness to legislative preferences over policy, and it gives reason to expect that using financial tools should better empower majority coalitions in influencing matters of policy.

Rosenberg (2008) notes that in 1943, Senator Langer (ND) amended the Educational Finance Act of 1943 to condition the Acts appropriations on nondiscrimination in the administration of benefits and cites Title VI of the Civil Rights Act as evidence of Congress's efforts being the primary impetus for school desegregation in the American South, years after *Brown v. Board of Education* (347 US 483, 1954).[5] Jenkins and Peck

4. Such attempts include the reduction of the Court's budget or the number of seats on the Court, or direct overrides of the Court's interpretation of statutory laws (Barnes 2002; Clark 2011).

5. Title VI of the Civil Rights Act prohibited discrimination on the basis of race, color, or national origin, and was enforced by empowering agencies to make rules and terminate or deny federal financial assistance to violators. While Title VI was discussed precious little during the 1964 congressional debates, Hugh Davis Graham held that Title VI "would become by far the most powerful weapon of them all" (Melnick 2011).

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(2013) trace the legislative history of Adam Clayton Powell's noteworthy amendment to the National School Lunch Act of 1946 to condition school lunch funds on desegregation—not *forcing* schools to desegregate but ensuring that federal funds would be contingent upon antidiscrimination—an instance that involves the precise indirect civil rights enforcement mechanisms that motivate this study.[6] It was this amendment that brought front and center the issues of a "separate but equal" school system with which liberal lawmakers disagreed but would not confront head-on for many years to come due in part to legislative conflict (Levine 2008: 83). This particular example highlights congressional use of the spending power for pragmatic rather than constitutional reasons. Yet it reflects both the contentiousness of the issues over which spending power regulation can arise, and the potential magnitude of the decision to regulate under the spending power rather than more direct pathways (see, also McCoy and Friedman 1988).

3. Congressional Use of the Spending Power

Congress's broad jurisdiction over federal spending can be traced back to the institutional debates that began with the nation's founding, with the Jeffersonians fearing that in the absence of Congress's ability to exercise its power over the purse strings of the national government, such power might instead shift to the much-feared executive branch (Kiewiet and McCubbins 1991: 12). As Congress has asserted liberally its spending power in maximizing regulatory control, courts have provided little long-range guidance about the voluntary or coercive nature of its control of spending as a behavior control strategy. Despite the growth of the national administrative state, the regulatory constraints imposed under the Burger and Rehnquist Courts—as well as the growing need for supermajority support in order to achieve policy movement (Sinclair 2002; Wawro and Schickler 2006)—provide reason to expect that Congress might better achieve, or else work toward policy goals through regulatory strategies less likely to yield confrontation with either the opposing political party or the judiciary. Thus, while Dinan (2002) holds that the Rehnquist Court's federalism decisions created obstacles to congressional coalitions asserting their policy preferences, I argue that shifts in enforcement strategy alone can help Congress to achieve its substantive goals.

I assume that members of Congress seek to set policy as close to their ideal point as can be maintained amid opposition from the veto players in the political process (whether the filibuster pivot, the president, or the judiciary). I expect that the selection of direct versus indirect regulatory strategies is guided, at least in part, by the expected costs—for example,

6. On the use of spending power regulation of education, it has been said that "[d]espite the voluntary nature of these federal programs... most state and local school districts cannot afford to decline federal funds. Consequently, there has been a relative decline in local discretion..." (Heise 1994: 365).

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risk of increasing legislative-judicial divergence or undermining coalition-building efforts—and the likelihood of success in passing their ideal legislation. On balance, spending power regulation should be perceived as less objectionable to those otherwise in opposition due to its failure to expand the administrative apparatus with which to enforce statutory provisions. It is, instead, an indirect regulatory pathway, albeit toward the same end-point, and consistent with MacDonald's (2010) analysis of limitation riders should be less subject to lawmaking hurdles such as presidential vetoes and antimajoritarian procedures. I assume also that congressional coalitions are forward-looking—that is, that they are mindful of potential future electoral losses and will seek to establish a "sticky" status quo should another legislative coalition come to power (see, e.g., Moe 1989). Given these considerations, the use of conditional spending provisions has been an effective tool for coalitions to achieve regulatory compliance when constitutional and institutional constraints preclude them from engaging in direct policy legislating.

I test two core hypotheses about congressional motivations to turn to the mechanism of the spending power enforcement, which are importantly interrelated in their examination of the effects of regulatory constraint on implementation strategy.

> H_1. Congressional coalitions enforce statutory prohibitions through the conditioning of funds as a response to judicial constraints against direct legislating.

I argue that congressional coalitions will be more likely to employ conditional spending regulation as legislative-judicial conflict increases, based either on acts of judicial review or broader measures of ideological divergence. This hypothesis speaks to the guns-free school zones conflict discussed above, and which resulted in the Supreme Court constraining congressional actors' Commerce Clause authority immediately preceding the congressional switch to using the spending power instead. In assessing congressional efforts to maintain its regulatory agenda, I build on claims that "[m]embers of Congress have repeatedly sought to bolster congressional capacity and power in order to maintain their chamber's institutional position" (Schickler 2005: 36). Whether through explicit prohibition against regulating or through cue-taking that the Court is acting to constrain congressional authority to regulate (e.g., based on holdings in favor of judicial power vis-à-vis Congress or considerable ideological distance), I propose that rather than reigning in its domestic policy agenda, congressional coalitions choose the alternate path of the spending power to achieve similar regulatory ends in affecting public policy.[7] That legislators

7. Ferejohn and Weingast (1992: 263) find that Congress often chooses to respond to Supreme Court decisions, though that is not to say that these legislative responses constitute the final say. However, see Hettinger and Zorn (2005), who dispute the likelihood of such congressional responses.

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would turn to the spending power to regulate in the face of these constraints against more direct regulation comports with Clark's (2011) cursory observation that Congress delivered a surge in bill introductions to condition federal funds on stricter eminent domain standards than the Court was willing to enforce in *Kelo v. City of New London* (545 US 469, 2005). This legislative pattern is seen most clearly in the treatment of Commerce Clause litigation and Congress's greater ease of regulating under the Spending Clause even when the Court states explicitly that more forceful regulation would be a transgression of its authority (*New York v. United States* [505 US 144, 1992]).

In the guns-free schools legislation discussed above, congressional use of the spending power allowed legislators to circumvent the judiciary's prohibition against Commerce Clause regulation. Given the success of this case and numerous other instances,[8] I expect that when the legislative agenda faces potential challenges from the judiciary, congressional coalitions will turn to this strategy in order to ensure better that their laws will both pass and endure.

In addition to blatant constitutional constraints against regulating, members of Congress face intra-branch pressures that shape their enforcement strategies in legislation. Thus:

> H_2: Congressional use of conditional spending regulation will increase when parties have narrow margins of control and thus must make concessions to facilitate legislative passage.

When members of Congress receive signals that their optimal legislation will fail to pass, I propose that they will make more indirect their enforcement strategies—in this case, spending power regulation—for the sake of preserving the main policy substance that motivated this legislative action and enabling final passage. The need for such alternate enforcement strategies should be particularly prevalent when parties are either in the minority or have only narrow margins of control rather than broad coalitions, given the increasing need for supermajorities in order to pass important legislation (Wawro and Schickler 2006) and thus the greater number of concessions that must be made in order to buy support from other legislators.

Amid greater partisan conflict within Congress, one can observe greater delays in the passage of appropriations legislation (Anderson and Woon

8. The Hyde Amendment in response to *Roe v. Wade* is another prominent example of congressional use of the spending power to directly challenge the Court. Although numerous anti-abortion measures were defeated in the House followed *Roe*, the Hyde Amendment to ban federal funding of abortions except to protect the life of the woman passed and became law in 1976 (Rosenberg 2008: 185). After numerous attempts at more direct confrontation with the Court's holding, it was the spending power that prevailed. Further, examination of patterns in bill introductions reveals increases in Fair Labor Standards Act-related bills in the aftermath of *National League of Cities v. Usery* (426 US 833, 1976) and in bills referencing violence against women in the aftermath of *United States v. Morrison* (529 US 598, 2000).

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2014), and one can reasonably expect that such delays from bargaining may extend to choices over enforcement mechanisms for the policy provisions being put forth by a congressional coalition. Because of the potentially devastating effects of funding termination and thus the motivation to comply *even in the absence of the actual use of power*,[9] legislators select the strategy of the spending power as the mechanism with which to work indirectly toward those same optimal policy outcomes.

There is an important question of why a coalition would be willing to pass spending power regulation if, despite its lack of transparent force, it achieves the same substantive policy objectives. Its reliance on a less formalized process to achieve those ends may reshape coalitions' willingness to pass such legislation, whereas when housing implementation power in one or more agencies, those actors may be loathe to relinquish that authority, leading to a greater stickiness of direct policymaking.[10] Overall, spending power regulation may be less divisive than is Commerce Clause or other direct regulation because as the Court noted in *New York v. United States* (505 US 144, 1992), it lacks the threat of force, and therefore may be less likely to face obstruction from the opposing party despite its potentially quite potent effects.

Although majority parties are generally successful in exercising negative agenda control to prevent the passage of legislation whose policy is undesirable to majority party members (Cox and McCubbins 2005), the mechanism through which Congress implements that policy is absent from their model and may affect the range of laws capable of passage and, in turn, moving policy from the status quo. After all, conditional spending regulation can strengthen positive agenda power—or the "ability to push bills through the legislative process to a final-passage vote on the floor" (Cox and McCubbins 2005: 20)—by enabling the formation of broader coalitions necessary for passage of important laws, while direct legislation of a salient issue by imposing clear administrative enforcement procedures may incite greater challenges and the exercise of negative agenda control. A bare partisan majority or strong minority may, therefore, find conditional spending regulation to be an attractive way to work toward policy goals without causing so much conflict that the opposing party would be tempted to engage in the transaction costs of drafting alternative legislation. If there is an increasing value of legislators' time in deciding whether to filibuster (Wawro and Schickler 2006), then seeking these backdoor mechanisms to work toward policy outcomes may provide

9. Melnick (2011) finds that agencies rarely go so far as to terminate funds to programs. However, see Cameron (2000) on the importance of the politics of negative power.

10. That is, while spending power regulation may garner the ideal *short-term* policy objectives given the necessity of federal funding, it may not create the enduring institutions that would cause greater concern in an opposing coalition, which might thus be better equipped to undo that policy when coming to majority status.

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a key alternative to engaging in a war of attrition and allow policy to move in the optimal direction.

I stress that these two hypotheses discussed above are importantly linked, in that while they do disentangle inter-branch and intra-branch effects on regulatory strategy with respect to enforcement devices, they both work to explain how congressional coalitions circumvent heightened separation-of-powers constraints to accomplish their policy agenda through the use of conditional spending regulation as opposed to other implementation strategies.

4. Empirical Model of Congressional Conditional Spending

4.1 Dependent Variable

The dependent variable is a count, ranging from 0 to 40, of the number of *major commands* (whether prohibitions or requirements) of regulated entities in significant laws that were enforced by way of conditioning of federal funds upon regulatory compliance. Major commands were coded when the law specified a discrete behavior that an entity is prohibited from doing (e.g., "It shall be unlawful for any person to discriminate against employees on the basis of race or sex") or required to carry out (e.g., "Organizations must submit financial reports"). When Congress elaborated a single prohibition already laid out (such as providing for exemptions from its application), the additional detail was not coded as additional major commands (see Appendix A for a more detailed discussion of how major commands were counted). A count was kept of the total major commands in the statute, as well as the number of commands with which entities were directed to comply in order to secure or maintain federal financial support.

Laws were drawn from Sean Farhang's (2011) dataset on statutory law and congressional delegation, in which the 366 statutes identified as significant by David Mayhew were coded for command-and-control regulatory provisions.[11] A law was considered regulatory if within the statute the national government sought to control or restrict the behavior of individuals, organizations, or subdivisions of government.[12] The 218 statutes from 1947 to 2008 which were identified as regulatory were coded twice for reliability, tracking the division of implementation authority between executive agencies and courts, as well as the use of conditional spending provisions. Within each of these laws were coded enforcement regimes, consisting of a set of major commands within a single policy domain that share the same enforcement mechanisms. Thus, environment and civil rights provisions enforced with civil penalties and hearings consist of

11. The data, its structure, and its variables come from Farhang's ongoing project on statutory specificity, which was shared with me while in process, and I finalized the coding for the purpose of this project.

12. Thus, laws that did not contain major commands were excluded from the data, as were those laws that regulated only foreign rather than domestic entities.

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two enforcement regimes; distinct civil rights provisions implemented in one case with private enforcement and in another case with administrative adjudication would constitute two regimes; and a list of several labor provisions all enforced with civil penalties would be collapsed into a single enforcement regime. There was an average of 4.14 enforcement regimes per law in the sample, with a total of 899 enforcement regimes. Because the study is focusing on congressional efforts to find alternative ways to statutorily control the behavior of other actors, I dropped those cases in which the federal government itself was the subject of regulation, leaving me with a total of 738 observations.[13]

Conditional spending regulation was coded as those circumstances in which the statute did not necessarily mandate regulatory compliance, but rather specified that funds would be withheld from those regulated actors failing to comply with requirements laid out statutorily, or that federal funds would be allocated *only* to those actors for whom certain regulatory conditions apply (e.g., providing prevailing wages for laborers and mechanics under the Davis-Bacon Act). These statements were construed narrowly, and did not include broader provisions that laid out general eligibility for grants, such as programs that serve certain regions or populations, or having certain educational curricula. They were coded strictly when the statute sought through the spending power to command and control regulatory compliance, such as withholding funds due to nondiscrimination based on sex, or explicitly making federal grants contingent upon the maintenance of fair labor standards or compliance with water quality standards. This conditional spending regulation in essence constitutes a delegation to the executive branch, with agencies holding the ultimate responsibility for the termination of federal funds due to noncompliance.

Figure 1 demonstrates that while the occurrence of conditional spending regulation increased markedly in the early part of the sample, there have been only moderate ebbs and flows in recent decades. A total of 42.9% of the laws in the sample had at least one instance of conditional spending regulation, with a sample-wide mean of 3.51 conditional spending prohibitions per law, though a predictably smaller mean of 0.85 conditional spending provisions per regime. The prevalence of the dependent variable across statutes only serves as further evidence of the need to understand better the virtually unexplored reasons for Congress's decision to turn to this regulatory pathway. The conditional spending provisions are distributed widely across policy areas, though public health and safety, labor, and civil rights are the most common domains in which this occurs and it is absent or rare in a small number of policy areas. Running the model excluding these particularly frequent policy domains does not affect the substantive findings.

13. This coding decision did not affect the substantive findings.

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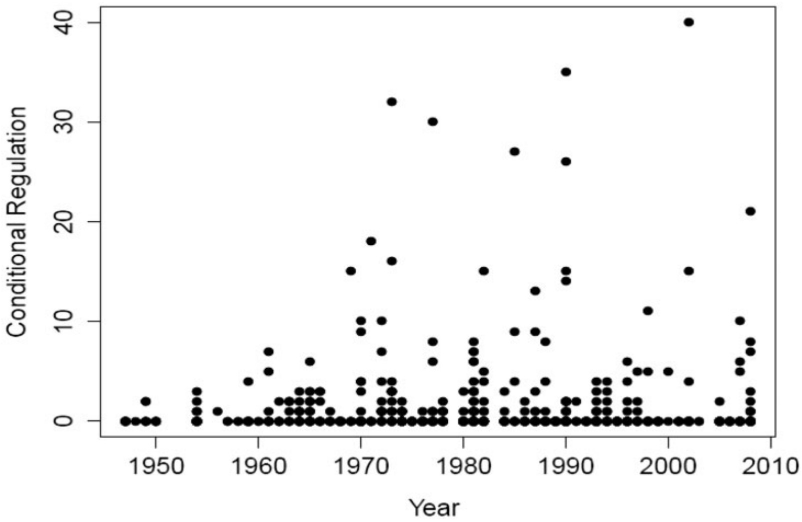

Figure 1. Conditional Regulation across Time.
Notes: This figure represents the number of instances of conditional regulation per enforcement regime across the years in the sample.

A limitation of this study is the data's restriction to significant laws rather than extending to the broader legislative landscape. Inherent in the study of lawmaking is the tradeoff of examining laws that are of most substantive interest and importance versus looking at those laws which comprise the bulk of Congress's outputs, which may permit greater generalizability. Running the models below with the inclusion of the Lapinski and Clinton (2006) legislative significance score[14] does not meaningfully affect the findings, and the coefficient on *Significance* was not bounded away from zero. This gives me confidence that within the domain of significance, the results are not being driven by the most or least significant laws in the sample. Moreover, I took a random sample of 100 post-war public laws not reaching the level of significance of the Lapinski and Clinton top 500 laws and identified whether or not the law employed spending power regulation, and nearly one-third of the laws employed this strategy at least once. This bolsters my claim that spending power regulation appears across a range of laws, and is not a phenomenon unique to the sample of significant legislation I analyze.

14. Lapinski and Clinton (2006) use an IRT model to calculate significance scores for all public laws from 1877 to 1994, given the significance ratings of Mayhew (2005), Cameron (2000), Stathis (2003), and others.

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4.2 Legislative-Judicial Distance

I employ two central measures to capture the Supreme Court's use of judicial review and constraints on congressional authority. The *Laws Struck* variable carries values of 0, 1, or 2, and captures whether 0, 1, or 2 or more laws were—in full or in part—struck invalid by the Court in the previous year. Examination of the raw count of laws struck (ranging from 0 to 4) revealed a curvilinear effect of laws being struck on Congress's use of conditional spending, which may be attributable to Congress adapting its behavior after feeling the pinch of judicial review. Consolidating counts of two or more laws being struck appears sufficient to capture Congress's response to this constraint, and employing a raw count of the number of laws struck or taking the logged value does not meaningfully affect the substantive findings. These data, gathered by the Government Accounting Office, extend through 2006 and include all laws down by the Court, across policy domains. Although this measure is crude, it allows me to avoid making assumptions about Congress having extensive awareness of judicial behavior, and such invalidation of legislation may be sufficient to trigger a "knee-jerk reaction to the use of judicial review" (Clark 2011: 140). I lagged these values by one year in order to allow time for a congressional response to this judicial constraint.[15] Consistent with expectations, Congress turned to its spending power authority to regulate guns-free school zones when an above-average amount of legislation had been struck invalid by the Court in the previous year, providing greater support for the measure's appropriateness in testing the paper's core claim.

Importantly, the explicit overturning of federal legislation is hardly the exclusive metric of the Supreme Court's constraints on congressional power to regulate public policy. Rather, while nevertheless upholding legislation, the Court may choose instead to adopt narrow statutory constructions that "approach the outer limits of congressional authority" (Melnick 2002: 3). Melnick characterizes this approach as forcing Congress to take a "sober second look" at extensions of federal authority to regulate, an approach that may carry nearly the same force of reigning in congressional power in policy implementation. While this presents difficulties in measuring judicial restraints on congressional powers, it does not preclude the assessment of a baseline level of constraint to which Congress may choose to respond statutorily. Moreover, the measure's crudeness in a sense provides me with a harder test of the theory presented above, with many unobserved judicial constraints contributing even further toward strategic reshaping of statutory enforcement strategies.[16]

15. Failing to lag these values would introduce post-treatment bias because the laws might have been introduced prior to the judicial constraint. I lag the variable by one year because allowing for more time between the "treatment" of legislation being struck and the effect of spending power regulation could potentially allow for more confounders.

16. See Figure 1A in Appendix A for a further evaluation of the patterns of Title VI spending power incorporation and acts of judicial review.

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To address this potentially meaningful effect of judicial behavior that may constrain congressional coalitions without going so far as to strike down legislation, I include also a *Judicial Power* variable, which consists of a count of the number of Supreme Court holdings in which the Court advocated an active role for the judiciary vis-à-vis Congress. These data were drawn from the Supreme Court Database, which identifies whether each case per year involved issues of judicial power and if so, whether the decision was in a liberal (pro-exercise of judicial power) or conservative (constrained judicial authority) direction. While these cases span a broad range of issues including but extending well beyond Commerce Clause regulation, I expect that the Court's demonstration of greater propensity to take action in the way of exercising judicial review and narrowing Congress's role in the regulatory process should trigger change in legislative strategy.

Given claims that few judicial actions are significant enough to justify legislative responses—as well as the potential endogeneity challenge that amid more judicial review, congressional majorities may give the Court fewer *opportunities* to strike down further legislation on constitutional grounds—I also create a measure of *Judicial Distance* between Congress and the judiciary across the sample.[17] Congress might respond to judicial distance at the Supreme Court level as a reaction to the very public exercise of judicial power, or the Appellate Court level given the high volume of law settled in this venue. Thus, I measure distance both levels of the judiciary in order to test these effects. Because congressional ideology is incorporated into both appellate-level and Supreme Court-level distance measures, I estimate separate models so as to avoid potential problems of multicollinearity with Congress's ideology fixed in both *Judicial Distance* measures. However, the key substantive findings are virtually unaffected by including them in the same model.

At the Court of Appeals level, I estimate the distance between the median legislators first-dimension common space NOMINATE score (Poole and Rosenthal 1997) and the average among appellate court judges' NOMINATE scores assigned by Giles et al. (2001),[18] scaled to be in the same policy space as Congress. At the Supreme Court level, I use Cameron and Park's first-dimension NOMINATE-Scaled Perception (NSP) scores of the Supreme Court justices through 2006[19] and measure

17. To assess the effect of this, I estimated the model without the *Judicial Power* variable and the results were virtually the same.

18. Appellate judges are assigned the president's NOMINATE score when appointed in a state in which neither senator is from the president's party, and the NOMINATE score of the senator (or the average of the two senators) when appointed in a state in which one or both senators belong to the president's party.

19. Cameron and Park's NSP scores incorporate both the NOMINATE score—or the best estimate of his or her DW-NOMINATE score as a congressman—and the Segal-Cover newspaper score of the justices, and they demonstrate that these composite scores are more effective than NOMINATE scores in predicting justices' behavior (Cameron and Park 2009).

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the distance between the first-dimension common space NOMINATE score of the median legislator and the NSP score of the median justice. As with the measure of *laws struck*, I lagged the ideology measures by one year.[20]

To capture not just ideological distance but also direction, I include an *Opposite* dummy variable, which is coded as a 1 if one institution is left-of-center ideologically (as indicated by a negative NOMINATE score) and the other institution is right-of-center (as indicated by a positive NOMINATE score). I address this because different degrees of liberalism between Congress and the judiciary may not prove as constraining as the same NOMINATE distance between a moderate-left Congress and a moderate-right judiciary. Thus, looking simply at the distance and not the party may prove inadequate in understanding these inter-branch constraints. I then interact the *Judicial Distance* and *Opposite* measures to examine the effect of Congress and the judiciary not just having meaningfully different ideal points, but having ideal points that are in different ideological directions from the center. Thus, high values on this interaction term can be interpreted as conditions in which there is great ideological (NOMINATE) distance *and* the judiciary and Congress are dominated by members of different political parties. This is the condition under which there should be the greatest constraint on Congress.

These measures collectively allow me to test the effects of both judicial behavior as well as the broader ideological disagreement in constraining congressional regulatory behavior, the latter of which do not require reliance upon observable behavior by the judiciary.

4.3 Intra-Branch Conflict

Given the documented rise in the need for party leaders to build supermajority support in order to break new ground in policymaking, measuring the margin by which a party is in power is informative in assessing its policymaking latitude.[21] Thus, with a narrow majority and a high level of polarization requiring supermajority support for a given bill, there is limited opportunity for either party to move the status quo closer to its ideal point. However, there is the potential for conditional spending regulation to be a vehicle for moving laws through the legislative cycle when the more direct administrative enforcement mechanisms for similar policy goals might simply be blocked.

20. As an additional robustness check, to address the possibility that the effect of judicial review depends at least in part on the extent of legislative-judicial distance, I included the interaction of *Laws Struck* and *Legislative-Judicial Distance*. The results are comparable and the interaction is insignificant. Results are reported in Table A1 in Appendix A.

21. Krehbiel holds that lawmaking outcomes are a result not of party strength, but rather supermajoritarian institutions (1998: 185), with gridlock caused by "moderate status quo policies, supermajority procedures, and heterogeneous preferences" amid unified or divided government (1998: 230). However, because I seek mainly to examine lawmaking with narrow majorities, I control for *Party Margin* rather than *Gridlock Interval*.

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To test the effect of intra-branch conflict, I calculated the *Margin of Control* based on the margin by which the majority party is in power, averaged across the chambers. The variable ranges from 0 to 1, with lower values indicating narrow majorities and thus more need to compromise, and higher values indicating larger margins of control and thus greater latitude to pass bolder policy. Because the Democratic and Republican parties may behave differently in working toward regulatory goals under conditions of narrow versus broad majorities—with the Democratic Party more commonly pro-regulation and thus pursuing a more active regulatory agenda, while the Republican Party is more commonly associated with deregulatory policies—I include a dummy variable for *Republican Congress* (coded 1 when Congress is controlled by the Republican Party, and 0 otherwise).

Current members of Congress are aware of potential electoral losses, in which case a future coalition could seek to undo the policies put forth by the current Congress (Moe 1989). If it is true, as Moe claims, that what is formalized will tend to endure, then coalitions should be mindful of the ways in which they structure not just policy provisions, but also the enforcement mechanisms to which they are attached. Thus, congressional use of the spending power should decrease when legislators face a greater risk of losing their current majority status, given their greater desire to impose enduring constraints on policy and thus to limit the discretion of future coalitions.[22] Epstein and O'Halloran (1999) call attention to the fact that when congressional coalitions are less sure of the future political conditions in which they will operate, they opt to delegate less discretion to the executive, holding on to more of the policymaking power for itself. Similarly, one might expect coalitions to hold on to the reins more through the use of direct legislating under such times of electoral uncertainty, given that legislators will be less sure of future policymaking conditions and turn to enforcement strategies more likely to be most enduring (e.g., imposing mandatory requirements of an administrator).

Consistent with the above claims, Farhang and Yaver (2016) find that under conditions of heightened electoral uncertainty when congressional coalitions hold on to thin margins of control, Congress works more vigorously to fragment enforcement power across actors and agencies in order to create coordination challenges in implementation and thus insulate policy against drift. Similarly, because conditional spending regulation does not implement in a way that locks down the law as directly—regulating behavior by way of strong *incentives* rather than through the creation of a sweeping administrative apparatus—it should be less likely to occur when members of Congress are most motivated to capitalize on

22. This is consistent with the above claim that opposing coalitions will be more willing to pass spending power regulation even when in the short-term achieving the same policy as direct regulation, given its less formalized institutional arrangement, which may make such legislation more potent in the short-term rather than the long-term.

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their current majority status by instilling a stickiness of the status quo policy.[23]

To address this congressional concern, I include an original *Electoral Uncertainty* variable that captures the degree of uncertainty in the political climate at the time of the statute's passage. The variable, ranging from 0.08 to 0.25, is the percentage of seats won in the previous election by margins of 5 percentage points or less, averaged across the chambers. These are not razor-thin margins of victory, yet they indicate above-average levels of competition—particularly in the House of Representatives, in which there is a well-documented incumbency advantage (see, e.g., Levitt and Wolfram 1997)—which would give members of Congress a greater sense of vulnerability. This concern about a loss of majority status—and in turn, concern about coalition drift—should propel legislators to instill a "sticky" status quo so as to protect its policy preferences (Moe 1989) rather than engaging in the less vigorous (and potentially less durable) spending power regulation.[24] Narrowing the window to margins of 2 percentage points or less does not have a meaningful effect on the data. I expect that the coefficient will be significant and negative. Consistent with expectations, at the time of the classic example of Congress's turn to spending power regulation of guns-free school zones, there was a below-average level of electoral uncertainty.

I also include a *Divided Government* dummy variable, coded as 0 when the President's party controls both chambers of Congress, and 1 otherwise.[25] Because I view spending power regulation as a compromise solution in lieu of direct legislating—potentially avoiding the inciting of legislative-executive conflict or executive subversion—and because consensual legislation should be more prevalent under divided government, I expect the coefficient to be positive.

4.4 Law Characteristics

The dependent variable is the number of instances in which Congress employs the spending power regulatory strategy. Thus, I include the count of *Major Commands* to control for the total number of prohibitions (requirements) in the law so as to account for the volume of regulation

23. This is not to say that withholding federal funds is not a potent form of punishment. Indeed, many industries such as public education are unable to function in the absence of these federal appropriations. However, incentive-based strategies do not, in the eyes of the Court at least, carry as much the threat of force as does administrative enforcement through such strategies as federal adjudications and injunctions.

24. A common measure of electoral uncertainty comes from Binder (1997), who measures the majority party's seat gains or losses as a proportion of total seats in the next election, averaged across both chambers. Due to the post-treatment bias of this variable, I use the alternative specification of narrow electoral margins, though using Binder's measure yields stronger results in the same direction.

25. Because the only divided Congresses in my data are the 97th–99th, I cannot draw meaningful inferences from comparing unified and divided Congresses.

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within each of the laws. Including this variable will allow me to ensure that I am not simply observing increases in conditional spending as a result of legislation simply addressing more regulatory conduct.

Congressional use of the spending power should be most likely to be employed in omnibus legislation. Within "must-pass" omnibus bills often fast-tracked through the committee process (Krutz 2001: 2), one may find policies too controversial to pass on their own, and brought to the floor when debates are focused on "the larger issue of the omnibus nucleus" (2001: 2). Thus, if conditional spending is a tool for congressional regulation amid both limited leverage and uncertainty over passage as free-standing legislation, then it should be more prevalent in omnibus packages. There should also be more prevalent conditional spending regulation in omnibus laws given their association with the appropriations process. While *South Dakota v. Dole* (483 US 203, 1987) laid out the specific conditions under which Congress justifiably may enact conditional spending provisions, one of the Court's main requirements was a nexus between the conditional spending provision and the law at large. If congressional coalitions seek to maximize regulatory freedom—and in turn, limit judicial interference in policy implementation—it stands to reason that Congress should attach many of its conditional spending provisions to appropriations laws. Because appropriations laws have the ultimate goal of deciding the allocation of federal funds, the nexus between the spending provision and the law by definition is the simplest and provides Congress with the greatest latitude to work toward its policy goals. To identify whether Congress is more likely to employ conditional regulation on omnibus laws, I use an *Omnibus* dummy variable, taking the value of 1 if omnibus and 0 otherwise, and which captures whether Congress sought to achieve multiple distinct policy objectives within a single law.[26] This is particularly relevant given MacDonald's claim that using limitation riders within appropriations bills—which often are of an omnibus nature—"engenders them with a greater measure of protection from presidential vetoes than most policies" given their must-pass nature (2010: 767).

I include the dummy variable *Spending Limit*—coded as a 1 when Congress limited appropriations toward the particular program being regulated and 0 otherwise—which seeks to capture whether Congress is more likely to employ conditional spending regulation when already imposing constraints on broader federal appropriations. Thus, I expect that the coefficient will be significant and positive. I include also the *year* of each law's passage to account for a linear time trend across the sample.[27]

26. Thus, the law need not have omnibus in its title if the regulatory content of the law was clearly heterogeneous, such as one title regulating communication policy and another title regulating transportation.

27. An alternative specification replaced the linear time trend with the more flexible cubic splines. The substantive effects of the results were comparable.

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4.5 The Model

I examine the data at the level of the 669 enforcement regimes for which I have complete data for all variables in the model. A total of 19% of these enforcement regimes contained at least one instance of conditional spending regulation.

The dependent variable in the model is the number of major commands per enforcement regime that were enforced by way of Congress's conditioning of federal funds upon regulatory compliance. Thus, a count model is appropriate to the data. Figure 2, which graphs the average number of conditional spending provisions per law by the number of laws struck unconstitutional, suggests a strong positive relationship between the number of laws struck and the prevalence of congressional use of the spending power to regulate. Figure 3 displays at this bivariate level the mean number of conditional spending provisions per law given the coding of a number of relevant dichotomous variables, and in most cases there is a noticeable effect on the prevalence of this strategy. Examination of a kernel density plot revealed that the dependent variable is strongly right-skewed. The dependent variable is overdispersed, which occurs when the variance exceeds the mean, thus violating an assumption of the Poisson model and suggesting that a negative binomial specification is more appropriate.[28]

Given the prevalence of counts of zero, I consider a model specification that accounts for the factors that inflate the observations of zero. Performance of the Vuong test confirmed that a zero-inflated negative binomial model best fit the data, thus allowing me to address the factors that may lead Congress to choose alternate regulatory strategies in such large number. The zero-inflated negative binomial model is a two-part model involving both the process of the negative binomial estimation, as well as the binary process predicting with a logit model the probability ψ of values producing excess zeros in the dataset. The binary process potentially includes different predictors than the count process in determining which variables directly affect the zero counts (Hilbe 2007: 174). To interpret the β parameters of the zero-inflated model, an x-unit increase in the independent variable translates to an $\exp(x_i\beta_i)$ change in the dependent variable. Coefficients in the inflation part of the model are logit coefficients and thus cannot be interpreted directly, but those that are positive and significant indicate that the variable is meaningfully producing counts of zero. To account for potential correlations among regimes within statutes, I cluster the standard errors by statute.

Due to the potentially numerous factors contributing to the excess zeros and affecting the model estimates, I provide multiple specifications of the

28. As a robustness check, I additionally ran the model with Ordinary Least Squares, as well as an ordered logit regression with a rescaling of the dependent variable to be on a 0 to 5 graded scale that better constrains the effects of outliers. In neither case did the respecification affect the key substantive findings.

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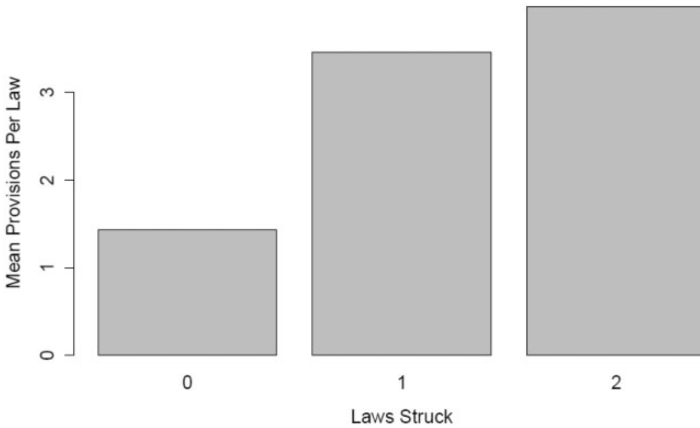

Figure 2. Conditional Spending Provisions by Laws Struck.
Notes: This figure demonstrates the marked increase in the mean number of conditional spending provisions given the number of laws struck by the Court in the previous calendar year.

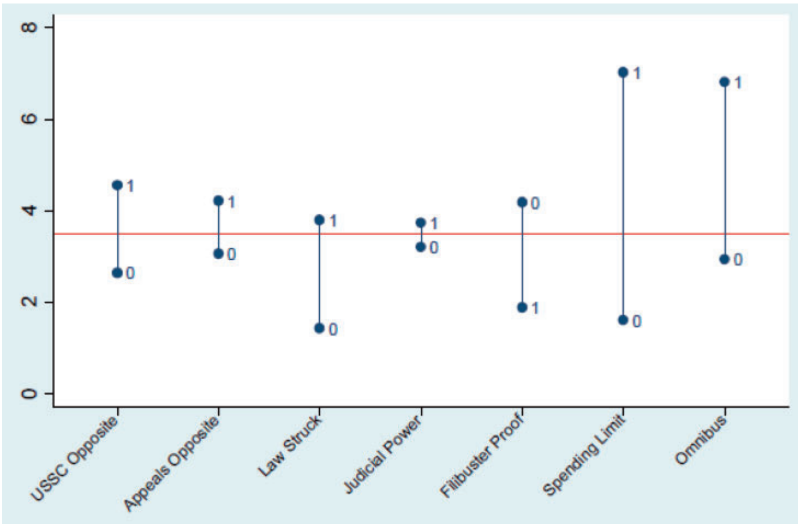

Figure 3. Mean Conditional Spending Prohibitions.
Notes: The horizontal line represents the law-wide mean number of conditional spending provisions. Points at 1 represent the mean number of prohibitions when one of these independent variables occurs or when one of these conditions is present (e.g., under conditions of the Supreme Court being opposite Congress, the mean number of prohibitions exceeds the sample-wide mean, at approximately 4.5 prohibitions).

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zero-inflated model to ensure robustness. I examine centrally the effect of policy domain on Congress's decision to condition funds on regulatory compliance rather than engaging in direct legislating. It is clear from the distribution of policy domains that conditional spending regulation is quite prevalent in some policy areas—for example, compared with a sample-wide conditional spending rate of 19%, the rate jumps to 28% in labor policy and 46% in civil rights—while in other cases such as banking, this regulatory strategy is rarely or never implemented. Figure 4 plots the distribution of mean conditional spending provisions per regime across policy domains, with the vertical line indicating the sample-wide mean. This shows that the overall rate of conditional spending regulation could—irrespective of institutional conflict dynamics—be brought down by the prevalence of regulation in domains deemed (for reasons beyond the scope of this study) not well-suited to this enforcement mechanism, despite the fact that the results—though weakened—are nevertheless robust to the exclusion of the policy domains in which spending regulation is most prevalent.

Thirty-six policy codes were assigned to each enforcement regime, specific to the policy content of the particular prohibitions.[29] Policy domains occurring in fewer than 2% of observations were collapsed into an "other" category. This left 17 policy dummies, which I put in the inflation portion of the model to estimate the occurrence of counts of zero versus positive counts of spending provisions.

5. Findings

Running a simple bivariate regression of the number of laws struck on the number of conditional spending provisions yields a statistically and substantively strong effect of judicial constraints on congressional use of this strategy. Table 1 provides the main results that I evaluate here, with the dependent variable of the number of conditional spending provisions per enforcement regime in the significant laws coded. I provide first a parsimonious specification of the model with just core variables of theoretical interest so as to ensure that the results are not merely an artifact of a control in the model. Consistent with my hypothesis, even in the absence of additional controls, I find that a unit increase in a statute being struck is associated with a 60 percentage point increase in conditional spending regulation, that spending power regulation is not made as necessary when holding wider margins of control in Congress, and that electoral uncertainty powerfully and significantly contributes toward decreases in the use of this less direct regulatory strategy.

Alongside the parsimonious specification of Table 1, I present the results of the full models with additional controls, along with the inclusion

29. For example, civil rights provisions in an environmental law were coded as civil rights policy.

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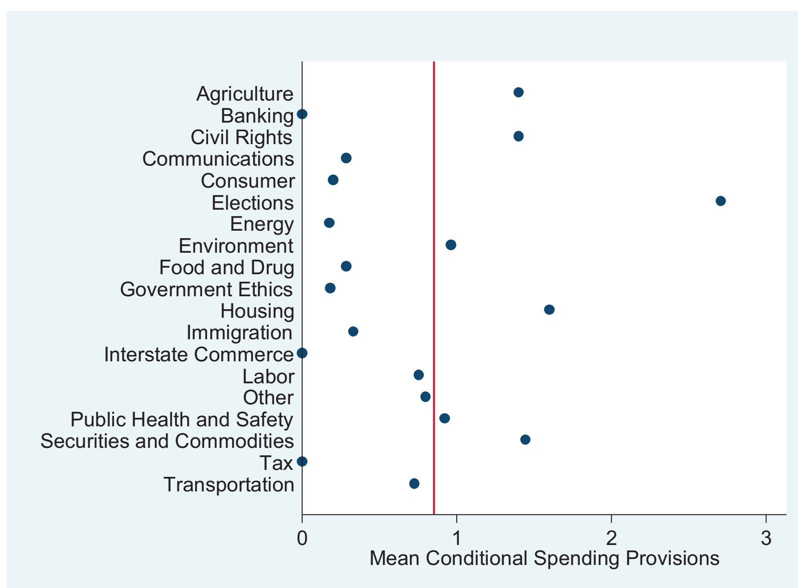

Figure 4. Mean Conditional Regulation by Policy.

of the 17 policy dummy variables into the inflation portion of the model (not displayed). The models provide strong support for the hypothesis that in the aftermath of more legislation being invalidated by the Supreme Court, Congress is more likely to use conditional spending regulation to achieve regulatory compliance from private and state actors. A unit change in the number of federal laws invalidated by the Supreme Court in the previous year increases by a factor of 1.10, or 210 percentage points, congressional propensity to regulate by way of conditional spending when controlling for ideological distance at the appellate court level, significant at the 0.01 level. Further, it increases by 62 percentage points the pursuit of this strategy when controlling for ideological distance at the Supreme Court, significant at the 0.01 level.[30] Despite the strong effect of laws being struck unconstitutional, there is no support for spending power regulation increasing with more holdings in favor of judicial power or increasing legislative-judicial ideological distance. While the coefficients for the interaction of *Judicial Distance* and *Opposite* are large and in the expected direction at both the appellate court and Supreme Court levels, they fall well below conventional levels of statistical significance. Thus,

30. Dropping outliers from the analysis did not affect the substantive findings in either model specification, nor did the use of jackknife estimation. Thus, I can be assured that the results are not being driven by the observations that are at the tails of the distribution of conditional spending provisions.

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Table 1. Predicting Conditional Spending Regulation from 1947 to 2008, Given Policy Domain

	Model 1 Parsimonious	Model 2 Full (Appellate)	Model 3 Full (USSC)
Laws struck	0.471**	0.742***	0.481**
	(0.177)	(0.199)	(0.194)
Margin of control	−2.854	−8.233***	−6.411*
	(1.659)	(2.449)	(2.625)
Electoral uncertainty	−7.242**	−9.320***	−8.455***
	(2.871)	(2.648)	(2.272)
Major commands	0.002	0.009	0.009
	(0.007)	(0.006)	(0.006)
Year	−0.017	0.003	−0.004
	(0.013)	(0.012)	(0.016)
Judicial power		0.036	0.027
		(0.026)	(0.030)
Republican congress		−1.610**	−0.954
		(0.554)	(0.648)
Divided government		−0.948*	−0.679*
		(0.441)	(0.292)
Spending limits		0.978***	1.198***
		(0.275)	(0.296)
Omnibus		0.228	0.028
		(0.367)	(0.375)
Judicial distance		1.937	−3.571
		(3.689)	(4.421)
Judiciary opposite		−0.509	−0.858
		(0.660)	(1.256)
Judicial distance × opposite		2.868	4.132
		(4.646)	(4.922)
Intercept	33.496	−3.968	10.690
	(25.013)	(24.226)	(31.104)
Inflate			
17 Policy Dummies	No	Yes	Yes
N	669	669	669

Notes: The dependent variable in all three models is the number of conditional spending provisions per enforcement regime in the statutes. Models are zero-inflated negative binomial with standard errors clustered by statute, and look at policy area in the inflation part of the model. Of the 36 policy codes assigned to the enforcement regimes, 16 occurred more than 2% of the time and the remainder were collapsed into an "other" category, making for a total of 17 policy dummy variables (not shown here) predicting counts of zero spending provisions.
$^{***}p < 0.001$, $^{**}p < 0.01$, $^{*}p < 0.05$, $^{+}p < 0.10$.

congressional coalitions appear to adapt their behavior from actions that directly rein them in, rather than cue-taking given divergence in ideal points.

The effect of *Margin of Control* is large and negative, lending support to the hypothesis that in addition to legislative-judicial conflict driving this regulatory strategy (in that case, propelling spending power regulation), a narrower degree of partisan support for legislative proposals appears to have a meaningful adverse effect on a legislative coalition's use of direct

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enforcement mechanisms. While Republican control of Congress is positive when controlling for ideology at the appellate level, it falls short of conventional levels of statistical significance when controlling for ideology at the Supreme Court level, thus requiring caution in interpreting the results.

The effect of *Electoral Uncertainty* has consistently negative, powerful, and statistically significant effects on the congressional use of the spending power, which is strongly supportive of my claim that amid concerns about losing majority status in Congress, congressional coalitions will work more actively to pursue direct implementation strategies rather than relying upon spending power authority. *Divided Government* has a significant and *negative* effect on congressional use of conditional spending regulation.[31] Consistent with expectations, congressional use of the spending power nearly triples when Congress is imposing other constraints on federal funds, though there does not appear to be a relationship with omnibus legislation.

6. Robustness Checks

Because a number of factors pertaining to the statutes themselves and the institutional climate during their passage may also drive the exceedingly high number of zeros in the dependent variable, I present an alternative specification of the zero-inflation model. I include in the inflation part of the first model a dummy variable for whether or not the state was the subject of regulation, given the frequent use of this tool as a means of asserting federal regulatory control over policies at the state level amid federalist ideology. I also include the *year* to account for fluctuations across time, the law-level count of *major commands* given that those laws with little regulatory activity may be prone to have counts of zero, and the *Court Opposite* and *Margin of Control* variables given that there may not be any need to turn to backdoor regulation in the absence of institutional conflict.

In this specification, a law being struck by the Court more than doubles the use of conditional spending regulation in the appellate court model (a 220 percentage point increase), though at the Supreme Court level the effect is somewhat smaller with a 59 percentage point increase. Moreover, the effect of *judicial power* rulings becomes significant in this case, albeit with small substantive effects, with a unit increase in judicial power cases yielding a 4 or 7 percentage point increase in spending power regulation in the appellate and USSC models, respectively. The effect of *Margin of Control* remains large and negative in both specifications, as

31. There is the potential that given agencies' ultimate determinations of whether entities are in compliance and thus eligible for federal allocations of funds, this strategy requires at least a threshold level of congruence between the congressional coalition and the executive branch. Further work should explore the use of spending power regulation given legislative-executive interactions.

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Table 2. Predicting Conditional Spending Regulation, Given Institutional Factors

	Model 4 Appellate	Model 5 USSC
Laws struck	0.790***	0.465*
	(0.219)	(0.227)
Judicial power	0.043+	0.073**
	(0.024)	(0.027)
Major commands	0.016*	0.014*
	(0.006)	(0.006)
Year	0.019	0.022
	(0.012)	(0.015)
Margin of control	−7.336*	−8.779***
	(3.117)	(2.370)
Republican congress	−1.232+	−0.694
	(0.657)	(0.555)
Divided government	−1.240*	−0.966*
	(0.617)	(0.450)
Electoral uncertainty	−10.607***	−11.946***
	(2.888)	(2.614)
Spending limits	0.658*	0.623*
	(0.277)	(0.275)
Omnibus	0.377	0.375
	(0.341)	(0.344)
Judicial distance	3.221	−3.813
	(3.899)	(4.426)
Judicial opposite	−1.067	−0.335
	(0.698)	(1.194)
Judicial distance × opposite	3.278	1.886
	(4.930)	(4.689)
Intercept	−35.728	−41.057
	(22.688)	(28.654)
Inflate		
State regulation	−4.496**	−4.541***
	(1.725)	(1.016)
Margin of control	0.300	−4.822
	(4.264)	(3.563)
Divided government	−0.804	−0.121
	(0.866)	(0.645)
Judicial opposite	−0.880	−1.835*
	(0.738)	(0.797)
Major commands	0.023**	0.026**
	(0.008)	(0.009)
Year	0.063**	0.036
	(0.024)	(0.022)
N	669	669

Notes: The dependent variable in both models is the number of conditional spending provisions per enforcement regime. They are zero-inflated negative binomial models, in this case evaluating in the inflation part of the model the institutional factors that may predict counts of zero spending provisions. Those variables in the inflation part of the model are logit coefficients.
$^{***}p < 0.001$, $^{**}p < 0.01$, $^{*}p < 0.05$, $^{+}p < 0.10$.

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observed in the models discussed above (see Table 2). In both models, the negative effect of electoral uncertainty remains substantively and statistically significant—reinforcing the claim that the strategy is less attractive when seeking more likely to establish a "sticky" status quo—and consistent with the prior models, divided government also appears to have an adverse effect on congressional use of this regulatory strategy. Consistent with expectations, I find in the appellate-level model that Republican-controlled Congresses are less likely to utilize this strategy to circumvent regulatory constraints, though this result is less consistent across specifications. Thus, while the results here are not wholly consistent in magnitude with the main specification discussed above, there appears to remain a powerful effect of statutory invalidation, partisan division in Congress, and electoral uncertainty on congressional coalitions' propensity to regulate by way of the spending power.

As an additional robustness check, I modeled in the zero-inflation model to include natural court dummy variables, allowing for the possibility that natural courts have sweeping regulatory philosophies from which Congress takes cues—for example, perceiving ideological dissonance with the Rehnquist Court due to rulings that may not extend as far as striking legislation—and including but extending beyond votes captured by the *Judicial Power* variable (see Appendix A, Table A2). This alternative specification produces even stronger effects of *Laws Struck*—with a unit increase in a law being struck yielding a 227 percentage point increase in spending regulation—as well as a strong and significant effects of *Margin of Control* and *Electoral Uncertainty*. Moreover, consistent with the findings in Table 2, I find that acts of *judicial power*, consistent with my priors, also contribute modestly to congressional use of its spending power, with a unit increase in *judicial power* cases yielding approximately a 7 percentage point increase in spending power regulation. The inconsistency of this effect requires caution of interpretation, though it is suggestive of the broader range of ways in which the Supreme Court's actions in relation to Congress can trigger changes in enforcement strategy.

Finally, given the significance of the state as the regulated actor—with *State* being highly significant in the inflation part of the Table 2 models and much of the impetus to use this strategy being grounded in the constraints of federalist Court rulings—I compared in Table A3 the results of regulation of private entities versus states. At the bivariate level, a difference-in-means test reveals a mean of 2.37 conditional spending provisions per regime when applied to states, compared with 0.60 among those regimes regulating private entities (individuals and businesses), significant at the 0.001 level. Turning to the zero-inflated models, in which I use the policy dummy variables in the inflation part of the model, while *Margin of Control* remains significant only within the context of regulating private parties, *electoral uncertainty* remains powerful and negative in both specifications. Most crucially, a unit change in *Laws Struck* leads to a 80 percentage point increase in spending power regulation of private parties,

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and a 58 percentage point increase in conditional spending regulation of states (see Appendix A Table A3). Thus, the regulated entity does not appear to drive the results of the study, with judicial constraints and electoral uncertainty continuing to have statistically and substantively significant effects on the use of this spending power enforcement strategy.

The marked consistency in the findings across specifications gives me confidence that while the zero-inflation is a nuisance that requires statistical correction, it does not appear to adversely affect interpretation of the significance of constraints by the judiciary or narrow partisan majorities, or electoral uncertainty on congressional use of conditional spending regulation.

7. Conclusions

The Supreme Court's 2012 holding on the Patient Protection and Affordable Care Act brings to light key features of legislative strategy that are the subject of my analysis, particularly given the uncertainty around more direct regulatory tactics amid a "new federalism." This distinction in the framing of policy and the choice of legislative strategy had a marked effect on the survival of this landmark piece of legislation under the Obama Administration, with Commerce Clause regulation deemed impermissible but the treatment of it as a tax holding constitutional muster. While it is not often the case that contestations over the taxing and spending powers of Congress reach the level of the Supreme Court, when such cases are decided it doubtless has a significant impact. And indeed, given the Court's expansive power to exercise judicial review of statutes, the dynamics of negative power (see, e.g., Cameron 2000) provide ample reason to suspect that even in the absence of the Court's exercise of judicial power over Congress, legislative strategy may still be shaped in meaningful ways given the powers at the Court's disposal.

The empirical findings of this article shed new light on the historical impact of judicial constraints on congressional policy regulatory authority, and the ways that Congress has managed nevertheless to implement public policy indirectly by appealing to the Spending Clause. It uncovers a new mechanism of how Congress achieves regulatory aims that have been otherwise foreclosed. It probes how coalitions historically have used—and continue successfully to use—backdoor mechanisms to shift the policy agenda when inter-branch and intra-branch conflict preclude it from achieving those outcomes more directly. Despite numerous claims that the judiciary's holdings rarely trigger legislative responses, this study reveals that in the face of limitations by courts in numerous policy domains including but extending well beyond civil rights and labor, members of Congress find different ways in which to defend these rights, even if those regulatory approaches are less transparent. Thus, while direct overrides and court-curbing activities may indeed be infrequent, congressional coalitions have found alternate regulatory avenues when less likely to meet

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success in more direct, sweeping administrative implementation. It extends a rich institutions literature (e.g., Epstein and O'Halloran 1999; Huber and Shipan 2002) holding that inter-branch conflict affects in important ways the nature of the legislation that emerges. Moreover, it calls attention to Congress's ability to manipulate not just policy locations, but also enforcement mechanisms to move the status quo policy even in the face of legislative conflict and potential coalition drift in Congress.

Clearly, there is much work to be done to demonstrate definitively the dynamics underlying congressional assertion of spending power authority to implement public policy. Further work should explore the extent to which legislators introduce bills seeking to condition funds on regulatory compliance, so as to understand better the timing of legislative responses, as well as the extent to which members of Congress seek this alternate pathway but do not meet success in final passage of spending as opposed to Commerce Clause regulation. And while the article provides strong evidence that congressional coalitions turn to this strategy strategically under conditions of institutional conflict, this article does not demonstrate to what extent this mechanism actually works in insulating Congress from review by the judiciary, though there is reason to expect that Congress's use of this strategy would not persist if it were ineffective in inoculating it from greater judicial scrutiny. Moreover, given Berry et al.'s (2010) highlighting of the important role of the president in the distribution of federal spending in domestic programs, we would do well to consider the extent to which the president can facilitate or otherwise influence the use of the spending power strategy over time. These would be productive avenues for future inquiry. Despite these limitations, this study nevertheless breaks new ground in demonstrating empirically the patterns of congressional assertion of its spending power and understanding better these legislative responses to constraints against direct administrative implementation.

Conflict of interest statement. None declared.

Appendix A
Spending Regulation Coding Procedure

Statutes in Farhang's dataset on statutory specificity and congressional delegation were drawn from Mayhew's significant legislation and read in full to code for the enforcement provisions and division of regulatory implementation authority between courts and agencies. Dummy variables were used to code for whether there was spending power regulation, which was defined as regulatory provisions contingent upon certain conditions, namely the receipt of federal funds. These were construed narrowly, and did not include broader provisions that laid out general eligibility for grants, such as serving certain populations of individuals or having certain educational curricula. They were coded strictly when the statute sought

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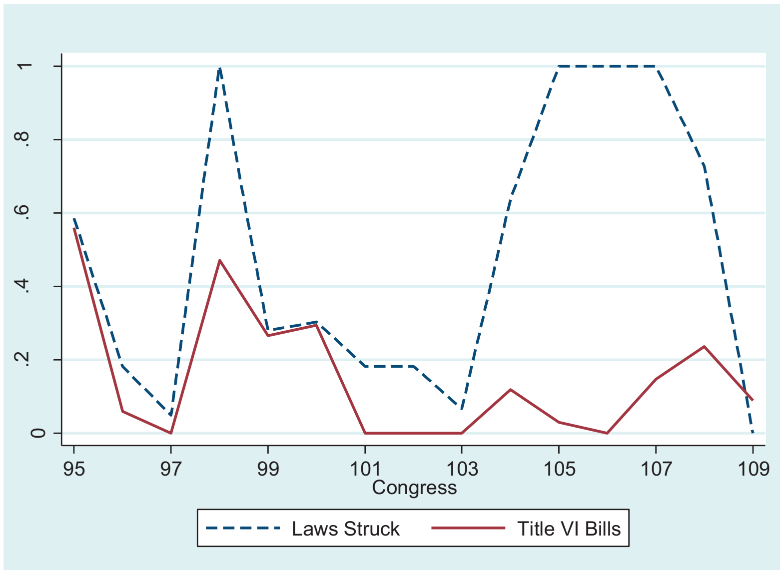

Figure 1A. Title VI Bill Introductions and Laws Struck, Normalized.

through the spending power to command and control regulatory compliance, such as withholding funds due to nondiscrimination based on sex, explicitly making federal grants contingent upon the maintenance of fair labor standards or compliance with water quality standards, or conditioning federal subsidies upon compliance with agricultural commodity quotas. Laws were not coded as having spending power provisions when the law said simply that Congress would not be *obligated* to provide funds if the regulated entity did not carry out a certain activity. In order for it to be coded, it had to clearly be a sanction with which Congress sought to drive individual actors' behavior, and not simply an eligibility criterion. State enforcement was excluded from the coding.

Examples of What Was Counted

- "No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance under this Act, the Federal Water Pollution Control Act, or the Environmental Financing Act. This section shall be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under Title VI of the Civil Rights Act of 1964. However, this remedy is not exclusive and will not prejudice or cut off any other

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Table A1. Conditional Spending with Judicial Conflict Interaction

	1A (Appellate)	2A (USSC)
Laws struck	0.604^{+}	1.419*
	(0.331)	(0.679)
Judicial power	0.027	0.058^{+}
	(0.029)	(0.032)
Legislative-Judicial distance	0.819	2.464
	(4.839)	(6.938)
Laws struck × Judicial distance	0.662	−3.325
	(3.069)	(2.252)
Court opposite	−0.473	−0.010
	(0.786)	(1.386)
Distance × opposite	2.309	1.007
	(5.501)	(5.517)
Margin of control	−6.552*	−8.006**
	(3.066)	(2.910)
Republican congress	−0.525	−0.600
	(1.112)	(1.034)
Republican control × margin	−17.907	−13.676
	(13.169)	(15.051)
Divided government	−0.665	−0.708
	(0.553)	(0.603)
Electoral uncertainty	−9.259***	−9.301***
	(2.655)	(2.351)
Spending limits	0.938***	0.949***
	(0.277)	(0.277)
Omnibus	0.272	0.199
	(0.412)	(0.392)
Major commands	0.009	0.009
	(0.007)	(0.006)
Year	0.003	0.013
	(0.029)	(0.014)
Intercept	−4.211	−25.440
	(26.665)	(26.918)
Inflate		
17 Policy dummies	Yes	Yes
N	669	669

Notes: These zero-inflated negative binomial models are identical to models 2 and 3 discussed in the body of the article, but in this case accounting additionally for the legislative-judicial distance and its interaction with legislation being struck as invalid. Standard errors are again clustered by statute.
$^{***}p < 0.001$, $^{**}p < 0.01$, $^{*}p < 0.05$, $^{+}p < 0.10$.

legal remedies available to a discriminate" (1972 Federal Water Pollution Control Act).

- Education Association shall not allocate federal funds until it has been given assurances of nondiscrimination against students (1972 Higher Education Act).
- It is a condition of federal grants that laborers and mechanics be paid prevailing wages for the locality (enforcement under the Davis–Bacon Act).

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Table A2. Conditional Spending Regulation, Given Natural Courts

	3A (Appellate) (Clustered SE)	4A (USSC) (Clustered SE)
Laws struck	0.821***	0.470+
	(0.198)	(0.272)
Judicial power	0.069**	0.076*
	(0.027)	(0.032)
Major commands	0.008	0.000
	(0.011)	(0.008)
Year	0.030 *	0.035*
	(0.017)	(0.018)
Margin of control	−9.313**	−12.344***
	(3.249)	(3.045)
Republican congress	−1.523	−1.567*
	(0.853)	(0.638)
Divided government	−1.239*	−1.184**
	(0.528)	(0.475)
Electoral uncertainty	−11.575***	−13.904***
	(3.477)	(2.597)
Spending limits	0.720**	0.647*
	(0.291)	(0.308)
Omnibus	0.453	0.368
	(0.392)	(0.396)
Judicial distance	6.732	−6.407
	(5.004)	(4.849)
Judicial opposite	−0.669	−1.110
	(0.891)	(1.357)
Judicial distance × opposite	−0.198	5.828
	(6.329)	(5.270)
Intercept	−58.543+	−64.180
	(32.551)	(34.408)
Inflate		
17 natural court dummies	Yes	Yes
N	669	669

Notes: The main part of the model here is identical to that in models 2 and 3 discussed above. However, rather than accounting for policy domain as the driver behind counts of zero conditional spending provisions, I include 17 natural court dummy variables (not shown here). Standard errors are again clustered by statute.
$^{***}p < 0.001$, $^{**}p < 0.01$, $^{*}p < 0.05$, $^{+}p < 0.10$.

How Major Commands Were Counted

Major commands were coded when Congress specified a discrete behavior that an entity must carry out (e.g., "It shall be unlawful for any person to discriminate against employees on the basis of race or sex"). When Congress provided greater specificity to a single command already laid out, the additional detail was not coded as additional commands. Enumerations of specific and distinct actions prohibited (required) were counted as separate commands.

Thus, a single command was counted when a statute specified, "It shall be unlawful for any person to transmit radio signals without permission."

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Table A3. Comparing Conditional Spending in Private Versus State Regulation

	5A (Private) (SE)	6A (State) (SE)
Laws struck	0.588*	0.456*
	(0.242)	(0.203)
Judicial power	0.005	0.056
	(0.037)	(0.052)
Major commands	−0.003	0.022***
	(0.007)	(0.006)
Year	−0.038	0.040
	(0.024)	(0.030)
Margin of control	−6.717*	0.647
	(3.002)	(3.392)
Republican congress	−1.926**	−0.432
	(0.664)	(1.134)
Divided government	0.212	−0.702
	(0.663)	(0.441)
Electoral uncertainty	−6.551*	−14.884**
	(3.045)	(4.821)
Spending limits	1.281***	0.661^{+}
	(0.399)	(0.393)
Omnibus	0.532	0.096
	(0.441)	(0.405)
Judicial distance	−3.134	8.306
	(4.412)	(5.390)
Judicial opposite	−0.664	2.728^{+}
	(0.821)	(1.650)
Judicial distance × opposite	7.013	−11.548*
	(5.528)	(5.795)
Intercept	77.318	−78.928
	(46.828)	(58.271)
Inflate		
17 policy dummies (not reported)		
Number of observations	567	102

Notes: The dependent variables are the number of conditional spending provisions per regime that target private behavior (5A) or state behavior (6A). The models are zero-inflated negative binomial with policy domain in the inflation part of the model and with standard errors clustered by Congress.
$^{***}p < 0.001$, $^{**}p < 0.01$, $^{*}p < 0.05$, $^{+}p < 0.10$.

A single command was also counted when a single prohibition was laid out, followed by greater specificity about the same prohibition: “All persons shall file a financial disclosure report. Such report shall include the name and place of business of each contributor, and the dollar amount contributed.” Three commands were counted if the language stated, “It shall be unlawful for any person to (1) Require that individuals work more than eight hours in a single workday unless provided overtime; (2) fail to comply with workplace safety regulations; or (3) fail to disclose in a public place employee rates of pay.”

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