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Confidence and Constraint: Public Opinion, Judicial Independence, and the Roberts Court

Alison Higgins Merrill,^{*} Nicholas D. Conway,^{**} and Joseph Daniel Ura^{***}

ABSTRACT

Although Americans continue to express greater and more stable levels of confidence in the Supreme Court than in Congress or the executive branch of the federal government, the Supreme Court's public standing has fallen steadily over the last fifteen years. A growing body of research in political science and related fields indicates that declining public support undermines judicial independence. To illustrate these effects, we estimate a statistical model of the Supreme Court's propensity to invalidate federal laws on constitutional grounds in each term from 1973 through 2014 and generate predictions of the number of federal laws struck down by the Supreme Court under various political conditions. This analysis shows how the decline in public support during the Roberts Court year has affected the Justices' willingness to invalidate federal laws. We argue that evidence of a link between persistent declines in the

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Supreme Court's public standing and lost judicial independence suggest that Chief Justice Roberts take a more aggressive public stance as an advocate for the Supreme Court.

For more than a decade, the Supreme Court's public standing has been in decline.¹ Although the Court continues to enjoy substantially more confidence than Congress or the executive branch, public support for the Court has recently reached at the lowest levels ever recorded in the survey record.² To be sure, the decline in public

¹ Political science generally recognizes two classes of attitudes about political institutions including constitutional courts in particular: specific support and diffuse support. DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* (1965). As defined by David Easton, specific support refers to "the favorable attitudes and predisposition stimulated by outputs that are perceived by [individuals] to meet their demands as they arise or in anticipation." *Id.* at 273. In other words, specific support is the belief that an institution produces outcomes consistent with one's interests and preferences. Gibson refers to specific support as "performance satisfaction." James L. Gibson, *Public Reverence for the United States Supreme Court: Is the Court Invincible?* (2012) (unpublished manuscript on file with the authors). Conversely, diffuse support refers to "reservoir of favorable attitudes or goodwill that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants." EASTON, *supra*, at 273. Diffuse support represents a willingness to accept and abide by an institution's decisions even when those decisions are inconsistent with one's interests and preferences. Gibson equates diffuse support with "legitimacy" and "loyalty." Gibson, *supra* at 17. Unless otherwise noted, we use the general terms "public support" and "public standing" to refer to specific support and its indicators.

See also JOSEPH DANIEL URA & ALISON HIGGINS, *THE SUPREME COURT AND PUBLIC OPINION* (Lee Epstein & Stefanie A. Lindquist eds., 2017).

² Tom W. Smith, Peter V. Marsden & Michael Hout, *General Social Surveys, 1972-2014, NAT'L OPINION RES. CTR.* (2015), <http://sda.berkeley.edu/sdaweb/analysis/?dataset=gss14>; *Supreme Court*, GALLUP (2016), <http://www.gallup.com/poll/4732/supreme-court.aspx>; *Few Conservatives View the Roberts Court as Conservative: Supreme Court's Favorable Rating Still at Historic Low*, PEW RES. CTR. (Mar. 25, 2013),

support for the Court started before Justice Roberts became chief justice but it has continued, if not accelerated, throughout his tenure.

Hostility toward the Court undermines the Justices' ability to use their institutional prerogatives to shape legal and political outcomes. Research in political science demonstrates that declining confidence in the Court undermines judicial independence: It creates political space for Congress and the President to penalize the Court, which in turn may lessen the Court's willingness to invalidate federal laws.³ Why open the door for congressional sanctions when it's possible to avoid them altogether by exercising judicial restraint? While low confidence in the elected branches may offset the political costs of

<http://www.people-press.org/files/legacy-pdf/3-25-13%20Supreme%20Court%20Release.pdf>; *Views of Supreme Court Little Changed as Major Rulings Loom*, PEW RES. CTR. (Apr. 20, 2015), <http://www.people-press.org/files/2015/04/4-20-15-Supreme-Court-release.pdf>; James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the U.S. Supreme Court: Is the Supreme Court's Legitimacy Imperiled by the Decisions it Makes?*, 80 PUB. OPINION Q. 622 (2016).

³ The elected branches of government, especially Congress, can penalize the Supreme Court in numerous ways. As Murphy notes, for example, members of Congress have "an impressive array of weapons which can be used against judicial power. They can impeach and remove the Justices, increase the number of Justices to any level whatsoever, regulate Court procedure, abolish any tier of courts, confer or withdraw federal jurisdiction almost at will, cut off the money that is necessary to run the courts or to carry out specific decisions or sets of decisions, pass laws to reverse statutory interpretations, and propose constitutional amendments to reverse particular decisions or to curtail directly judicial power." Walter Murphy, *The Elements of Judicial Strategy* (1964), U. CHI. PRESS. TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 26 (2011). Throughout this Article, we refer to these types of actions as "court curbing." Walter Murphy, *The Elements of Judicial Strategy* (1964), U. CHI. PRESS. TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* (2011), see especially pages 982–84 showing *inter alia* that high public support for the Supreme Court mitigates the negative association between congressional court curbing bills and invalidations of federal laws.

invalidating laws, the Court nonetheless remains in a precarious position. Additional erosion of its public support or an increase in confidence in Congress or the President could further curtail judicial independence.⁴

To demonstrate the consequences of these political dynamics and the magnitude of their effects, we estimate a statistical model of the Court's willingness to invalidate federal laws on constitutional grounds in each term between 1973 and 2014. This model allows us to predict the number of federal laws struck down by the Court under various political conditions—including changes in public support for the Court and Congress.

PUBLIC CONFIDENCE IN THE SUPREME COURT

Since 1973, the General Social Survey (GSS) has asked a representative sample of Americans to evaluate various public and private entities. It asks respondents, "I am going to name some institutions in this country. As far as the people running these institutions are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them?" The Supreme Court, Congress, and the "[e]xecutive branch of the federal government" are among the institutions the GSS identifies.⁵ The resulting GSS confidence dataset is among the longest-running and most complete record of Americans' evaluations of their governing institutions⁶; it is especially useful because it asks about multiple institutions using the same question stem, permitting reasonable comparisons of evaluations of the three branches of

⁴ Joseph Daniel Ura & Patrick C. Wohlfarth, *An Appeal to the People: Public Opinion and Congressional Support for the Supreme Court*, 72 J. POL. 939 (2010).

⁵ Smith et al., *supra* note 5.

⁶ Gregory A. Caldeira, *Courts and Public Opinion*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303–34 (1990); JOSEPH DANIEL URA & ALISON HIGGINS, THE SUPREME COURT AND PUBLIC OPINION (Lee Epstein & Stefanie A. Lindquist eds. 2017).

government. Additionally, responses tap individual attitudes related to both specific support (performance approval and policy agreement) and diffuse support (legitimacy, institutional loyalty).⁷ For these reasons, political scientists often use these confidence data to measure public support for the Supreme Court and the other branches of government.⁸

Figure 1 shows GSS confidence data for each branch of the national government.⁹ The top panel is the percentage of GSS respondents reporting that they have a “great deal” of confidence in each institution.¹⁰ The middle panel shows the percentage of respondents saying they have “hardly any” confidence in each institution. The bottom panel reports the ratio of “great deal” of confidence respondents to “hardly any” confidence respondents.

The GSS data show that Americans’ confidence in their governing institutions has declined substantially over the last four decades, and this decline has been particularly acute for elected branches. In 1973, 29% and 24% of Americans said they had a great deal of confidence in the executive branch and Congress. In 2014, 11% said they had a great deal of confidence in the executive branch, and only 6%

⁷ James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354 (2003) especially pages 360–63.

⁸ See, e.g., CLARK, *supra* note 6. See also Robert H. Durr, James B. Gilmour & Christina Wolbrecht, *Explaining Congressional Approval*, 41 AM. J. POL. SCI. 175 (1997) especially pages 668–70 (Durr and his co-authors refer to the General Social Survey confidence data as the “National Opinion Research Center” or “NORC” data—The National Opinion Research Center is the organization that conducts the General Social Survey).

⁹ Smith et al., *supra* note 5.

¹⁰ The GSS was not conducted in 1979, 1981, 1992, or in odd-numbered years since 1993. In this analysis, values for missing years average confidence levels are imputed by taking the average of the preceding and following years’ values. The latest GSS data now publicly available for this analysis is from 2014.

reported a great deal of confidence in Congress. In the same period, the percentages of Americans saying they had hardly any confidence in the executive branch grew from 19% to 45%, and claims of hardly any confidence in Congress increased from 16% to 53%.

Historically, the standing of the Court has been higher and more stable than evaluations of Congress and the presidency. In the first three decades covered by the GSS, between 1973 and 2002, the percentage of Americans reporting a great deal of confidence in the Supreme Court dropped to 30% or below for only four years and was never lower than 26%. In those years, only 14% of respondents on average said they had hardly any confidence in the Court.

However, Americans' confidence in the Supreme Court began a steady decline in 2002. Expressions of a great deal of confidence in the Court have decreased from 37% to 24%, and expressions of hardly any confidence have increased from 11% to 20%. The ratio of "great deal" of confidence in the Supreme Court responses to "hardly any" confidence responses in the GSS has been less than 2:1 since 2009; it reached the lowest level in the survey's history in 2014, the last year of available data. Although confidence in the Court remains robust compared to Congress and the presidency, it is increasingly difficult to deny that Americans' view of the Supreme Court is dimming.

Other surveys lend support to this conclusion, as Figure 2 indicates.¹¹ The top panel shows Gallup data from 1973 to 2016 on public confidence in the Court. In this poll, Gallup asks respondents to choose among "a great deal, quite a lot, some, or very little" confidence and records volunteered responses of "none." The middle panel shows data from Pew Research Center surveys conducted between 1987 and 2015 asking, "Would you say your overall opinion of the Supreme Court is very favorable, mostly favorable, mostly

¹¹ *Supreme Court, supra* note 5. *Few Conservatives View the Roberts Court as Conservative: Supreme Court's Favorable Rating Still at Historic Low, supra* note 4; *Views of Supreme Court Little Changed as Major Rulings Loom, supra* note 4.

unfavorable, or very unfavorable?” The final panel displays Gallup data from 2000 through 2016 on whether Americans “approve or disapprove of the way the Supreme Court is handling its job?” Each of these measures of the public’s view of the Supreme Court indicates a clear and generally steady decline in favorable attitudes about the Supreme Court over the last fifteen years.

CONSEQUENCES OF DECLINING PUBLIC SUPPORT FOR THE SUPREME COURT

A substantial body of research in the social sciences and law demonstrates that positive public perceptions of the Court (and constitutional courts more generally) forestall or buffer political attacks from other branches of government and create electoral incentives for the other branches to accept judicial authority.¹² When

¹² The Court’s Justices may cultivate public support by maintaining ideological consistency between its decisions and public mood (see for example Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74 (2011); Robert H. Durr, Andrew D. Martin & Christina Wolbrecht, *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768 (2000); Kevin McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993)), using symbols of institutional legitimacy (see, for example, James L. Gibson & Michael J. Nelson, *The Legitimacy of the Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201 (2014)), adjusting the language used in opinions (see, for example, Ryan C. Black, Ryan J. Owens, Justin Wedeking & Patrick C. Wohlfarth, *The Influence of Public Sentiment on Supreme Court Opinion Clarity*, 50 L. & SOC’Y REV. 703 (2016)), and pursuing greater consensus (see, for example Gregory A. Caldeira & Christopher J. W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874 (1998); Joseph Daniel Ura & Carla

support for courts is sufficiently high, election-minded officials are prompted “to respect judicial decisions as well as the institutional integrity of a court” by the “fear of . . . a [public] backlash” against court-curbing activity.¹³

This research indicates that a decline in public confidence in the Court can erode judicial independence in ways big and small.¹⁴ Importantly, disapproval and distrust of the judiciary could encourage court-curbing actions by Congress.¹⁵ In an extreme historical example, unpopular Federalist efforts to seat some of the “midnight judges” appointed by John Adams undermined public confidence in the judiciary and prompted Jeffersonian Republicans to adopt the Repeal Act 1802, eliminating judgeships, limiting the Court to one term per year, and forcing justices to ride circuit.¹⁶ In turn, court curbing or the threat of court curbing can lead to judicial self-restraint.¹⁷

The recent decline in public confidence in the Court has similarly contributed to erosion of the Court’s independence during the Chief

M. Flink, *Managing the Supreme Court: The Chief Justice, Management, and Consensus*, 26 J. PUB. ADMIN. RES. & THEORY 185 (2016); James R. Zink, James F. Spriggs II & John T. Scott, *Courting the Public: The Influence of Decision Attributes on Individuals’ Views of Court Opinions*, 71 J. POLITICS 909 (2009)).

¹³ Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review* 45 AM. J. POL. SCI. 346, 347 (2001); see generally CLARK, *supra* note 6; Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 L. & SOC’Y REV. 87 (1996); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343 (1998); Michelle M. Taylor-Robinson & Joseph Daniel Ura, *Public Opinion and Conflict in the Separation of Powers: Understanding the Honduran Coup of 2009*, 25 J. THEORETICAL POL. 105 (2013).

¹⁴ Caldeira, *supra* note 8; URA & HIGGINS, *supra* note 8.

¹⁵ See Ura & Wohlfarth, *supra* note 5; Vanberg, *supra* note 14.

¹⁶ Knight & Epstein, *supra* note 14.

¹⁷ CLARK, *supra* note 6.

Justice Roberts' tenure. This erosion is evident in political actors pressuring the Court to reach particular decisions, or threatening the Court's independence in response to decisions already made, including: President Obama's 2010 State of the Union criticisms of *Citizens United v. Federal Election Commission*,¹⁸ Chief Justice Roberts's "wobbly" vote in *National Federation of Independent Businesses v. Sebelius*,¹⁹ efforts by the Clinton campaign to try "scaring" the Court²⁰ into upholding subsidy payments to participants in federal Affordable Care Act exchanges in *King v. Burwell*,²¹ and Senate Republicans' refusal to act on the nomination of Merrick Garland to succeed Justice Antonin Scalia.²² Holding all else constant, greater public confidence in the Court would have raised the expected political costs (and mitigated the political benefits) of criticizing the Court's past or prospective actions. While any particular attempt to influence the Court may have still occurred, the decline in the public's trust in the Court has made these attempts

¹⁸ *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010); Barack Obama, Fmr. President of the United States, State of the Union Address (Jan. 27, 2010) (transcript available in the University of California at Santa Barbara American Presidency Project, <http://www.presidency.ucsb.edu/ws/index.php?pid=87433> (last visited March 7, 2017); Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), <http://www.nytimes.com/2010/01/29/us/politics/29scotus.html>.

¹⁹ URA & HIGGINS, *supra* note 8; Nat'l Fed'n of Indep. Bus. v. Sebelius, 123 S.Ct. 603 (2012); Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), <http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/>.

²⁰ Robert Post, *Rolling Justice Roberts*, WALL ST. J. (Oct. 14, 2016), <http://bit.ly/2gEJupw>.

²¹ *King v. Burwell*, 135 S.Ct. 475 (2015); Post, *supra* note 24.

²² Harper Neidig, *No Hearing for Obama's Supreme Court Nominee, McConnell Says*, THE HILL (Mar. 16, 2016), <http://thehill.com/blogs/blog-briefing-room/news/273230-mcconnell-no-hearing-for-garland>.

systematically more likely to occur.

ASSESSING THE EFFECTS OF PUBLIC CONFIDENCE FOR
INDEPENDENCE

To demonstrate the consequences of these political dynamics and show the magnitude of their effects, we estimate a statistical model of the Supreme Court's propensity to invalidate federal laws on constitutional grounds in each term from 1973 through 2014 expressed as a function of public evaluations of the Supreme Court and Congress.

We use the number of federal laws struck down by the Court as an indicator of *judicial independence*. In the case of the Supreme Court, scholars have identified the latent quality of judicial independence with the Court's constitutional invalidation of federal laws.²³ Striking down acts of Congress on constitutional grounds is an act of judicial power that the elected branches cannot—at least not theoretically—overturn by an ordinary statute.²⁴ A decision to invalidate a federal law hinges on the Court's willingness to replace Congress's views of constitutional limits on federal power with its own. Therefore, considering the constitutionality of federal laws demonstrates judicial independence. Holding all else equal, a more independent Court's willingness to strike down acts of Congress should yield more

²³ CLARK, *supra* note 6, 977–78; Jeffrey A. Segal & Chad Westerland, *The Supreme Court, Congress, and Judicial Review*, 83 N.C. L. REV. 1323, 1339–41 (2005).

²⁴ There are of course rare examples of Supreme Court decisions striking down federal laws on constitutional grounds abrogated by subsequent acts of Congress. *Hammer v. Dagenhart* struck down the Keating-Owen Act, which prohibited the inter-state sale of products made with child labor. *See Hammer v. Dagenhart*, 247 U.S. 251 (1918). The Fair Labor Standards Act of 1938 later regulated working conditions contrary to *Hammer* and was upheld by the Supreme Court in *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

invalidations.²⁵

To measure the public's disposition toward the Court and Congress, we turn to the General Social Survey.²⁶ We measure the public standing of the Court as the percentage of GSS respondents in each survey year expressing "hardly any" confidence in the Supreme Court,²⁷ and the public standing of Congress as the percentage of GSS respondents saying they have "hardly any" confidence in Congress. We expect that the model will return estimates of a

²⁵ We use Whittington's (2005) count of federal laws struck down by the Supreme Court reported by Clark (2011) and extended by us through 2014. KEITH E. WHITTINGTON, *JUDICIAL REVIEW AND INTERPRETATION: HAVE THE COURTS BECOME SOVEREIGN WHEN INTERPRETING THE CONSTITUTION?* (2005); CLARK, *supra* note 6. The number of federal laws invalidated by the Supreme Court in a particular term is, of course, an aggregation of the outputs of nested political processes beginning with Congress making laws in the first place, laws generating cases, lower courts making decisions anticipating the reaction of higher courts, litigants making strategic decisions about pursuing appeals, and the Supreme Court's Justices making strategic decisions about whether or not to grant certiorari. The study of how choices made in earlier stages of these related events influence choices made in later stages is now unfolding in political science, law, and related fields. *See, e.g.*, Matthew E. K. Hall & Joseph Daniel Ura, *Judicial Majoritarianism*, *J. POL.* (2015); Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Courts Constitutional Rulings, 1987-2000*, 31 *LEGIS. STUD. Q.* 533 (2006); Anna Harvey & Barry Friedman, *Ducking Trouble: Induced Selection Bias in the Supreme Court's Agenda, 1987-2000*, 71 *J. POL.* 574 (2009); Kevin McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 *J. POL.* 1018 (2004); Kevin T. McGuire, Georg Vanberg, Charles E. Smith Jr. & Gregory A. Caldeira, *Measuring Policy Content on the U.S. Supreme Court*, 71 *J. POL.* 1305 (2009)). However, like most empirical analyses of Supreme Court decision-making, the analyses reported here focus only on the resolution of cases that reach the merits stage in the first place.

²⁶ Smith et al., *supra* note 5.

²⁷ CLARK, *supra* note 6, at 125.

negative association between disaffection from the Supreme Court and the number of laws struck down in each year. Conversely, we also expect to find a positive relationship between mistrust of Congress and the number of federal laws invalidated by the Court.

The dependent variable in the analysis is the number of federal laws invalidated by the Supreme Court in each year, a count with a lower bound of zero. In the absence of strong autocorrelation or overdispersion, this type of data is often modeled using the Poisson regression estimator.²⁸ The annual count of federal laws invalidated since 1973 shows only weak autocorrelation ($r_{t, t-1} = 0.15$), and the time series' estimated dispersion parameter (α) in a negative binomial regression is zero. We therefore use the Poisson regression approach to model the annual number of federal laws invalidated by the Supreme Court expressed as a function of public evaluations of the Supreme Court (% hardly any confidence), public evaluations of Congress (% hardly any confidence), as well as dummy variable for each natural court to control for otherwise unmodeled factors arising from the composition of the Court. Data are available from 1973, when the GSS first asks its institutional confidence battery, through 2014.²⁹ Model estimates are reported in Table 1.

RESULTS

The statistical estimates align with prior findings about the role of public opinion in shaping judicial independence. Holding all else constant, as the public becomes more hostile to the Supreme Court, the Justices' propensity to invalidate federal laws decreases significantly. Conversely, as the public becomes more hostile to Congress, the Justices' propensity to strike down federal laws increases significantly. These results provide further evidence that public evaluations of the coordinate branches of the national

²⁸ Patrick T. Brandt et al., *Dynamic Modeling for Persistent Event Count Time Series*, 44 AM. J. POL. SCI. 823 (2000).

²⁹ Smith et al., *supra* note 5.

government influence how the Supreme Court uses its institutional prerogatives.

We can use the model estimates to generate predictions of how many laws the Court will invalidate in a given year under various conditions. Figure 3 shows the predicted number of federal laws invalidated as public evaluations of the Court and Congress change. The left panel shows predictions for a relatively low-level of “hardly any” confidence responses in the Congress (21%, about one standard deviation below the average level of hardly any confidence responses since 1973) as the public becomes less confident in the Court (hardly any confidence in Congress responses rising from one standard deviation below the mean on the left to one standard deviation above the mean on the right). The middle panel shows predictions of the number of invalidated laws when the percentage of GSS respondents reporting “hardly any” confidence in Congress is at its mean (31%) as the public becomes less confident in the Court (across the same range). Finally, the right panel shows predictions when the percentage of respondents saying they have “hardly any” confidence in Congress is about one standard deviation above the mean (31%) as mistrust of the Supreme Court rises. Predictions are illustrated by the solid lines with 95% confidence intervals shown by the dotted lines.

The model’s predicted counts exhibit the pattern we expected. As the public loses confidence in the Court, the predicted number of invalidations falls for all levels of confidence in Congress. Increasing the percentage of GSS respondents expressing “hardly any” confidence in the Court from one standard deviation below the mean to one standard deviation above the mean reduces the expected number of federal laws invalidated each year by one to four laws, depending on the public’s view of Congress. Conversely, as the public loses confidence in Congress, the predicted number of laws struck down rises. Increasing the percentage of GSS respondents expressing “hardly any” confidence in Congress from one standard deviation below the mean to one standard deviation above the mean increases the expected number of federal laws invalidated by one and one half to four laws, depending on the public’s level of confidence

in the Supreme Court. Together, these predictions show that the Court's current (low) public standing depresses the Justices' propensity to invalidate acts of Congress despite the historic lack of public confidence in Congress and the presidency.

REFLECTIONS ON THE ROBERTS COURT

The Court faces many challenges as it moves into the second decade of John Roberts's service as Chief Justice. The Court faces a nation that is deeply divided after the recent presidential election and heading toward an uncertain future with an untested leader.³⁰ In the near term, the Court will likely decide high-profile cases on abortion, the death penalty, and religious liberty. Over the next several years, the Court is also likely to encounter continued turnover, a steady stream of cases testing the limits of Republicans' unified control of the federal government, and controversies over executive power emanating from the Trump administration.

Although the Roberts Court still has political allies in Congress and the White House at least over the near term, the Court is fifteen years into a steady decline in its public standing and boasts the least

³⁰ ALAN I. ABRAMOWITZ, *THE POLARIZED PUBLIC? WHY AMERICAN GOVERNMENT IS SO DYSFUNCTIONAL* (2013) (especially 101–41); Jeffrey M. Jones, *Record-High 77% of Americans Perceive Nation as Divided*, GALLUP (Nov. 21, 2016), <http://www.gallup.com/poll/197828/record-high-americans-perceive-nation-divided.aspx>; Jeremy W. Peters, Megan Thee-Brenan & Dalia Sussmannoy, *Election Exit Polls Reveal a Starkly Divided Nation*, N.Y. TIMES (Nov. 8, 2016), https://www.nytimes.com/2016/11/09/us/politics/election-exit-polls.html?_r=0. And, on the variety and difficulty of challenges facing the Trump administration beyond the judiciary see, for example, *What's the Biggest Test Trump Will Face in 2017?*, POLITICO (Jan. 3, 2017), <http://www.politico.com/magazine/story/2017/01/whats-the-biggest-test-trump-will-face-in-2017-214594>.

public confidence it has had in the last four decades.³¹ The Court and its members have little political capital to insulate their actions or their institution from political attacks from Congress or the President, especially a media-savvy president with little regard for the norms that traditionally structure presidential-judicial relations.³² Although Congress and the executive branch are even more poorly regarded than the Court,³³ the public's limited confidence in the judiciary weighs against the Supreme Court Justices' willingness to challenge the elected branches of the national government and exercise their power of judicial review. This may become especially important over the long run, should Democrats eventually regain control of the elected branches of government, adding more direct ideological disagreement to the lines of conflict between the Court, Congress, and President.

In an interview with Jeffrey Rosen conducted at the close of his first term as Chief Justice, John Roberts expressed keen awareness of the Chief Justice's role in preserving the institutional integrity of the Supreme Court.³⁴ He explained his willingness to compromise

³¹ Smith et al., *supra* note 5; *Supreme Court, supra* note 4; *Few Conservatives View the Roberts Court as Conservative: Supreme Court's Favorable Rating Still at Historic Low, supra* note 4; *Views of Supreme Court Little Changed as Major Rulings Loom, supra* note 4; Gibson & Nelson, *supra* note 4.

³² Peter Baker, *Trump Clashes Early With Courts, Portending Years of Legal Battles*, N.Y. TIMES (Feb. 5, 2017), <https://www.nytimes.com/2017/02/05/us/politics/donald-trump-mike-pence-travel-ban-judge.html>; *see also Donald Trump's Three Types of Norm Violations*, WASH. POST (Dec. 19, 2017), https://www.washingtonpost.com/posteverything/wp/2016/12/19/donald-trumps-three-types-of-norm-violations/?utm_term=.edfe6b0aa851.

³³ This is evident, for example, in the GSS confidence data described above; Smith et al., *supra* note 5.

³⁴ Jeffrey Rosen, *Robert's Rules*, THE ATLANTIC (2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss->

principle with an eye toward building consensus within the Court and avoiding conflict with other institutions. With John Marshall's efforts to promote agreement among the Justices in mind, Justice Roberts said, "every justice should be worried about the Court acting as a Court and functioning as a Court, and . . . [about] the Court as an institution."³⁵

Despite the current Chief Justice's strong sense of history and responsibility, the public's view of "the Court as an institution" continues to break down under his watch.³⁶ Although it is not clear that any action or set of actions within Roberts's reach alone can reverse this trend, it seems that his quiet efforts to promote consensus and avoid conflict are not enough to prop up the Court's public standing.

Instead of emulating Chief Justice Marshall, Justice Roberts may be better off following the lead of a different predecessor, Chief Justice William Howard Taft. Although Justice Taft's historical reputation suffers from his uneven record as a jurist, he was unquestionably among the most active and successful chief justices in enhancing the Court's discretion, standing, and independence.³⁷ Like Justice Roberts, Justice Taft worked to limit dissent and promote consensus among the Justices.³⁸ However, Justice Taft was also a public advocate for the Court and the rest of the federal judiciary, lobbying Congress to create the Judicial Conference of the United States, give the Court greater discretion over its plenary docket, and

rules/305559/.

³⁵ Rosen, *supra* note 35.

³⁶ Smith et al., *supra* note 5; *Supreme Court, supra* note 4. *Few Conservatives View the Roberts Court as Conservative: Supreme Court's Favorable Rating Still at Historic Low, supra* note 4; *Views of Supreme Court Little Changed as Major Rulings Loom, supra* note 4; Gibson & Nelson, *supra* note 4.

³⁷ Post, *supra* note 24.

³⁸ Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decision-making in the Taft Court*, 85 MINN. L. REV. 1267 (2001) (discussed especially on pages 1309–55).

authorize construction of a permanent, dedicated Supreme Court building.³⁹ According to Anderson, Justice Taft's career as chief justice "was dedicated to maintaining and strengthening the public reputation of the Court as . . . [a] national symbol of . . . the rule of law," and "he was as aggressive in the pursuit of his agenda in the judicial realm as Theodore Roosevelt was in the presidential."⁴⁰ Chief Justice Roberts is an intelligent, articulate, and telegenic figure with a strong sense of the Court's mission and an appealing vision of the Court's role in American national politics. He has the makings of an effective public representative of the Court, and the Court as an institution stands to benefit from his becoming a more aggressive and visible advocate for it.

³⁹ HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* (1986); Erick Trickey, *Chief Justice, Not President, Was William Howard Taft's Dream Job*, SMITHSONIAN MAG. (Dec. 5, 2016), <http://www.smithsonianmag.com/history/chief-justice-not-president-was-william-howard-tafts-dream-job-180961279/>.

⁴⁰ Donald Anderson, *Building National Consensus: The Career of William Howard Taft*, 68 U. CIN. L. REV. 323, 353 (1999).

Figure 1: General Social Survey: Confidence in the Three Branches of Government

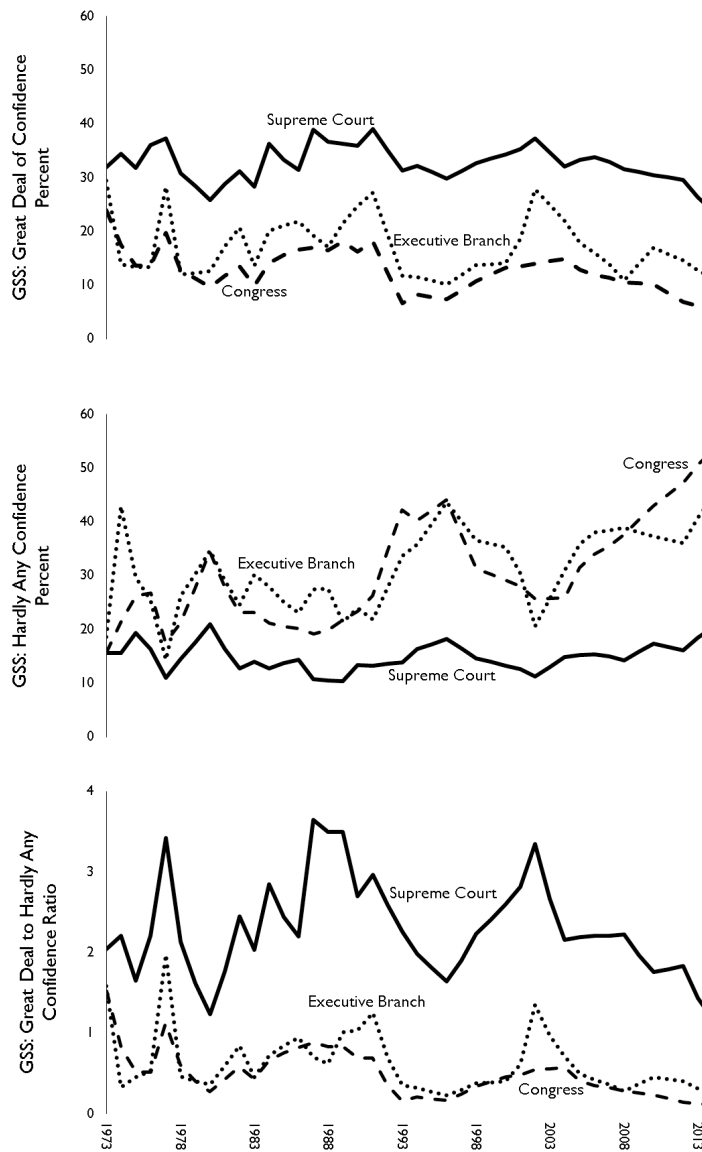


Figure 2: Gallup and Pew: Supreme Court Confidence, Favorability, and Approval

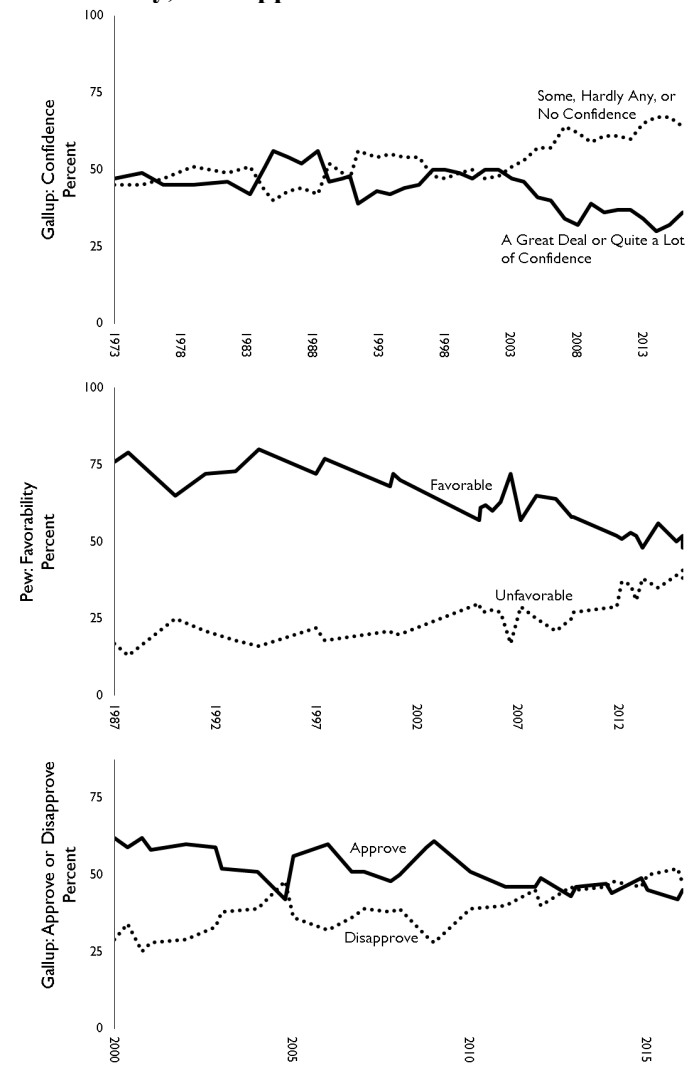


Figure 3: Predicted Counts of Invalidated Federal Laws

