

ESSAYS ON JUDICIAL REVIEW

A Dissertation

by

GARRETT NATHANIEL VANDE KAMP

Submitted to the Office of Graduate and Professional Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

Chair of Committee,	Joseph D. Ura
Committee Members,	Jon R. Bond
	David Fortunato
	Ian R. Turner
	Arnold Vedlitz
Head of Department,	Guy D. Whitten

August 2019

Major Subject: Political Science

Copyright 2019 Garrett N. Vande Kamp

ABSTRACT

The existence of judicial review confronts scholars of political institutions, particularly scholars of law and judicial politics, with several important questions. Why do democracies like the U.S. allow courts staffed by unelected judges to have the final say on all constitutional questions? Why do elected political institutions—notably Congress and the president—refrain from using their institutions prerogatives to curb or constrain courts? Existing research on these questions can be categorized into two groups. Independence-based theories of judicial review argue that some mechanism constrains the other branches of government to respect judicial review. Majoritarian theories of judicial review argue that governments can desire courts to exercise judicial review in ways that advance the government’s policy goals. While previous research efforts have yielded much fruit, I build upon it in three important areas. First, scholars have yet to fully and directly consider the role of the Court’s ideological preferences when studying the relationship between judicial independence and judicial review, a task to which I devote my attention in chapter 2. In chapter 3, I argue that majoritarian theories need to take into account the separation of powers between branches of government. In chapter 4, I examine severability doctrine in order to derive and test new hypotheses based on both legal scholarship and positive political theory. I conclude in chapter 5 by summarizing the results of my research and noting future areas of inquiry.

ACKNOWLEDGEMENTS

A feat as large as a dissertation cannot be completed without incurring a substantial amount of debts. The most obvious debts are to my dissertation committee. They suffered through countless hours of reading my sloppy, crude work and helped guide it to become a respectable form of scholarship. Beyond that, however, each of my committee members invested in me personally. Joe took a chance on me when I decided to switch my field of study and helped guide me through the literature I wanted to contribute to despite not knowing where to begin. Jon graciously decided to still serve on my committee after that change of subject and has been involved in my work, scholarly or otherwise, since I arrived in College Station. Ian stayed current on my research even after moving institutions. In contrast, David invested heavily in me despite joining my committee relatively late. Arnie, finally, has been an ideal outside member, seriously engaging with my scholarship despite it being outside his field of expertise.

Other faculty in the department have been equally influential in the completion of my studies, if outside my dissertation directly. Paul Kellstedt taught me both substantive and methodological political science throughout my tenure here; more importantly, he provided honest and encouraging advice on pursuing an academic career in all of its ups and downs. Guy Whitten regularly mentored my methodological interests, both in classes he taught and opportunities he provided me. Kim Hill mentored me early in my career, helping me hone my research skills and providing helpful advice on how to tackle graduate school. Alex Pacek and Matthew Fuhrmann have been helpful

while serving as Directors of Graduate Studies. Carlisle Rainey, Ahmer Tarar, Scott Cook, Bill Clark, and Quan Li all taught me at various stages, for which I am appreciative. And in general, the entire department has been helpful and encouraging throughout my time here.

The department staff have been equally helpful in finishing my studies. Lou Ellen Dozier and Amy Winn have provided invaluable encouragement and support in dealing with my great nemesis, OGAPS. Dede Bright helped me on plenty of occasions accomplishing what should be basic tasks. Brad Epps and his ever changing, but always lovable, tech crew has helped me when my computer problems exceed my millennial fluency with computers. And the rest of the staff has always been kind enough to help me when I need to file paperwork that I have invariably forgotten.

My fellow students I have met during my time at Texas A&M have provided me invaluable personal happiness in addition to the professionally rewarding relationships we have cultivated. The more advanced graduate students mentored me throughout my career, even after they graduated and pursued their careers. My cohort provided help and encouragement through the many difficult trials we faced together, whether it was difficult exams or studying for our prelims. And the newer graduate students provided valuable help when asking questions about my work; learning, it seems, is a two-way street. My favorite fellow student, Clarissa Gonzalez, has been particularly noteworthy in providing the love and support I need to finish my degree; in hopes of keeping that love wherever I go, we will be married in July of this year.

I could not have gotten into a PhD program without the love and support of my family. Their constant encouragement was essential to my staying in the program when I considered quitting, and they always provided a sanctuary during the breaks between semesters. For years, I have annoyed them by proclaiming that I am a doctor. I hope that I become more sufferable now that the claim is actually true. I love each member of my family very much; I hope this written record of that love makes up for all the times that I have forgotten to say it over the years.

Finally, I would like to thank God for giving me the gifts necessary to complete this degree. Any good idea contained here is attributable to his inspiration; any flaw is one that I hope he can help correct in me over time. I am still a long way from the person I want to be, but I pray that God will continue to help me in his abundant mercy and grace. Praise God from whom all blessings flow.

CONTRIBUTORS AND FUNDING SOURCES

Contributors

This work was supervised by a dissertation committee consisting of Professors Joseph D. Ura, chair, Jon R. Bond, and David Fortunato of the Department of Political Science, Professor Ian R. Turner of the Department of Political Science at Yale University, and Professor Arnold Vedlitz of the Department of Public Service and Administration at Bush School of Government and Public Service.

The initial data for this project was provided by Professor Ura, above, and Professor Matthew Hall of the Department of Political Science at the University of Notre Dame. Additional data for Chapter 3 were provided by Professor Charles Shipan of the Department of Political Science at the University of Michigan.

All other work conducted for the thesis (or) dissertation was completed by the student independently.

Funding Sources

Graduate study was supported by an assistantship from Texas A&M University and a dissertation fellowship from the Institute for Humane Studies.

TABLE OF CONTENTS

	Page
ABSTRACT	ii
ACKNOWLEDGEMENTS	iii
CONTRIBUTORS AND FUNDING SOURCES.....	vi
TABLE OF CONTENTS	vii
LIST OF FIGURES.....	ix
LIST OF TABLES	x
1. INTRODUCTION.....	1
1.1. Origins and Inquiries of Judicial Review.....	1
1.2. References	5
2. THE CONDITIONING ROLE OF JUDICIAL INDEPENDENCE IN THE EXERCISE OF JUDICIAL REVIEW	6
2.1. Introduction	6
2.2. Judicial Independence and its Role in Judicial Review	9
2.3. Independence as a Moderator of Preferences.....	14
2.4. Research Design.....	18
2.5. Analysis	25
2.6. Discussion	35
2.7. References	40
3. PRESIDENTS, LEGISLATURES, AND MAJORITARIAN JUDICIAL REVIEW..	46
3.1. Introduction	46
3.2. Motivations for Majoritarian Judicial Review	48
3.3. Majoritarian Judicial Review in Presidential Systems.....	53
3.4. Congress – The Purse and Public Opinion.....	55
3.5. The President – Executive without Equal	58
3.6. Research Design.....	62
3.7. Analysis	71
3.8. Discussion	77

3.9. References	79
4. SEVERABILITY DOCTRINE AND THE EXERCISE OF JUDICIAL REVIEW	84
4.1. Introduction	84
4.2. The Jurisprudence of Severability	86
4.3. Critical Views of Severability Doctrine	89
4.4. Severability Doctrine and Severability Clauses	90
4.5. Severability Doctrine as Statutory Decisionmaking	96
4.6. Research Methods	99
4.7. Analysis	104
4.8. Discussion	110
4.9. References	113
5. CONCLUSIONS	118

LIST OF FIGURES

	Page
Figure 2-1: Average Marginal Effect of Court Ideology of Table 3, at the Empirical Minimum and Maximum Levels of Independence (90% Confidence Intervals)	34
Figure 2-2: Average Marginal Effect of Court Ideology of Table 4, at the Empirical Minimum and Maximum Levels of Independence.....	35
Figure 3-1: Example of Marginal Effect Plot Supportive of Hypotheses	63
Figure 3-2: Average Marginal Effect of Mechanisms of Majoritarian Judicial Review on the Probability of the Court Invalidating a Statute by the Ideological Distance between the Court and Congress.	74
Figure 3-3: Average Marginal Effect of Mechanisms of Majoritarian Judicial Review on the Probability of the Court Invalidating a Statute by the Ideological Distance between the Court and the president.....	76
Figure 4-1: Predicted Probability of the Court Granting a Constitutional Challenge to a Statute by Years After Initial Passage and Presence of a Severability Clause	106

LIST OF TABLES

	Page
Table 2-1: Heckman Probit Model of Additive Independence and Judicial Review	26
Table 2-2: Heckman Probit Model of Additive Independence and Judicial Review, Continued.....	29
Table 2-3: Heckman Probit Model of Conditional Independence and Judicial Review ..	31
Table 2-4: Heckman Probit Model of Conditional Independence and Judicial Review, Continued.....	32
Table 3-1: Heckman Probit Model of Legislative-Focused and Executive-Focused Majoritarian Judicial Review.....	72
Table 4-1: Probit Model of Constitutional Challenges Granted to an Important Federal Statute by Year, 1949-2011.	105
Table 4-2: Heckman Multinomial Probit Model of Decision to Invalidate an Important Federal Statute, 1949-2011	108

1. INTRODUCTION

1.1. Origins and Inquiries of Judicial Review

A defining characteristic of constitutional courts like the U.S. Supreme Court is their ability to exercise judicial review. Using this power, constitutional courts can make decisions that undermine the policy goals of legislative and executive officials by invalidating statutes and executive actions. In the U.S., such broad political powers are wielded by judges who are unelected and possess lifelong tenure. This arrangement, is, on its face, contrary to important principles of electoral democracy. But the U.S. Supreme Court is subject to the different methods of court curbing by Congress and the president. These processes go beyond simply ignoring or circumventing decisions made by the judiciary, a possibility since most courts rarely have power outside of pronouncing the legality of the cases it is hearing (Epstein and Knight 1998, Meernik and Ignagni 1997, Dahl 1957). The other branches have control over the budgets of judiciaries, with the option of either supplying or starving courts of resources like support staff and salary increases (Hayo and Voight 2007; Ura and Wohlfarth 2010). The other branches also have the ability to change the amount of discretion constitutional courts have in determining their docket, allowing elected officials to limit the realm of cases where constitutional courts can exert their influence (Harvey 2013). Finally, the other branches have the ability to pursue constitutional changes that would damage a constitutional court or even impeach the justices (Whittington 2007).

Yet even with the means to punish the Supreme Court, Congress and the president do not interfere with the operations of the Court on a regular basis. Consider the case *Citizens United v. FEC*, in which the Supreme Court ruled that portions of the Bipartisan Campaign Reform Act of 2002 were unconstitutional. Legal scholars have described the ruling in *Citizens United* as “the most countermajoritarian decision invalidating national legislation on an issue of high public salience in the last quarter century” (Pildes 2010). Given the other branches’ combined ability to curb and even ignore this decision, it would not be surprising for the Supreme Court to see reprisals. But as has been noted, “there has been virtually no suggestion of any legislative effort to retaliate against the Court or bring it to account, nor to challenge the ruling directly by enacting new legislation that tests the Court’s commitment to the decision” (Pildes 2010). This creates a puzzle for scholars of judicial politics: why do democratic governments tolerate judicial review of their actions by constitutional courts?

A large research agenda in both the American and comparative literatures has developed around this central question. But while previous research efforts have yielded much fruit, current scholarly understanding of judicial review suffers from three important deficits. First, scholars have yet to fully and directly consider the role of the Court’s ideological preferences in its exercise of judicial review. Current theoretical work implicitly assumes that a constitutional court’s independence from other branches of government conditions the role that a court’s ideological preferences play in its decision to exercise judicial review. Yet this argument has yet to be explicitly made, and empirical tests of such theories only show that judicial independence from court-curbing

only allows for constitutional courts to strike more laws. Chapter 2 addresses shows that this inconsistently is present across a wide range of theoretical accounts of judicial review and seeks to test empirically the argument core at the center of these theories using U.S. Supreme Court data.

Second, majoritarian theories of judicial review posit that elected officials can rely on a constitutional court's power of judicial review as a tool to advance the government's policy goals. Such theories largely focus on the U.S. Supreme Court and cite historical accounts of such activity. But these theoretical mechanisms do not take into account a system of government characterized by a separation of powers, largely treating elected officials as if they control a monolithic policymaking institution. Given that different branches of government can have different preferences over whether the Court strikes a statute, which branch of government does a court support? In chapter 3, I answer this question using the first quantitative test of majoritarian theories of judicial review.

Third, scholars have largely limited their study of judicial review on the question of whether a government action is constitutional or not. Constitutional courts like the U.S. Supreme Court, however, must make a number of additional decisions after determining an action is unconstitutional. Perhaps the most prominent decision that must be made is the decision whether an unconstitutional statute is severable or inseverable. While legal scholars have long debated the Court's approach to severability, it has yet to be studied from a positive standpoint. Chapter 3 fills this gap by applying both legal

scholarship and positive political theory to derive and then test a series of hypotheses about the Court's use of severability doctrine.

I conclude this work by discussing the major results in this paper. This discussion will also highlight limitations with the collective studies and potential areas for future research.

1.2. References

- Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6 (2):279–295.
- Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: Congressional Quarterly Press.
- Harvey, Anna. 2013. *A Mere Machine: The Supreme Court, Congress, and American Democracy*. New Haven: Yale University Press.
- Meernik, James, and Joseph Ignagni. 1997. "Judicial Review and Coordinate Construction of the Constitution." *American Journal of Political Science* 41 (2): 447-467.
- Hayo, Bernd, and Stefan Voigt. 2007. "Explaining de facto judicial independence." *International Review of Law and Economics* 27 (3): 269-290.
- Pildes, Richard H. 2011. "Is the Supreme Court a Majoritarian Institution?" *Supreme Court Review* 2010 (1): 103–58.
- Ura, Joseph D. and Patrick C. Wohlfarth. 2010. "'An Appeal to the People': Public Opinion and Congressional Support for the Supreme Court." *Journal of Politics* 72(4):939-956.
- Whittington, Keith E. 2007. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*. Princeton: Princeton University Press.

2. THE CONDITIONING ROLE OF JUDICIAL INDEPENDENCE IN THE EXERCISE OF JUDICIAL REVIEW

2.1. Introduction

Scholars have long recognized the importance of strategic decision-making in explaining judicial behavior (Epstein and Knight 1997). Judges must make their decisions by taking into account the actions of their peers (Caldeira, Wright, and Zorn 1999, Maltzman, Spriggs, and Wahlbeck 2000, Bonneau, Hammond, Maltzman, and Wahlbeck 2007) and higher-ranking judges (Epstein, Landes, and Posner 2013, Hansford, Spriggs, and Stenger 2013) in order to achieve decisions that best advance their ideological preferences and legal jurisprudence. Beyond the confines of the judiciary, judges must also make decisions that will placate other political elites (Spiller and Gely 1992, Vanberg 2001, Rios-Figueroa 2007, Segal, Westerland, and Lindquist 2011) and the public (Mishler and Sheehan 1993, McGuire and Stimpson 2004, Clark 2009, Carruba 2009) in order to ensure implementation of their decisions and to avoid court-curbing efforts. Cumulatively, these latter studies poignantly demonstrate that judicial independence is far from guaranteed for most courts. Further, the level of independence a court has drastically influences its behavior; this is especially true for decisions involving judicial review since these decisions are usually of interest to both the political elite and the public.

Yet while scholars have regularly grappled with the strategic implications of judicial independence for judicial review, their empirical efforts do not always match

their theoretical work. Consider the case of *Gonzales v. Carhart* (2007). The U.S. Supreme Court upheld the Partial-Birth Abortion Act of 2003 as constitutional. Whatever the legal merits of the case, the 5-4 decision clearly split the justices on ideological grounds. Writing for the conservative members of the Court, Justice Kennedy's majority opinion remarked that "[t]he act expresses respect for the dignity of human life". Justice Ginsburg's dissent, joined by the liberal wing of the Court, called the decision "alarming" and lamented that it "reflects ancient notions of women's place in the family and under the Constitution — ideas that have long since been discredited."

Using this case as an example, one can see a distinct gulf between the theoretical and the empirical contributions in previous work. From a theoretical perspective, *Gonzales* is entirely consistent with the literature. The U.S. Supreme Court, a historically popular institution, issued the highly publicized *Gonzales* decision at a time when the U.S. government was divided between a Republican, pro-life President Bush and a Democratic, pro-choice Congress, both of which were controlled by the other party in recent history. All of these factors buttress the independence of the Court and, because judicial independence was secure, the Court was free to decide *Gonzales* in a way consistent with the preferences of the conservative majority of justices on the Court.

From an empirical perspective, however, *Gonzales* actually undermines many strategic accounts of judicial review. Many scholars have proposed and tested hypotheses that when some mechanism increases the independence of a court, there will be a direct, additive increase in the exercise of judicial review: both in the probability that a court will strike a given statute and the aggregate number of statutes struck down

in a given period of time (Vanberg 2001, 2005, Rios-Figueroa 2007, Clark 2009, 2011, Carrubba et al 2015). But the Court chose to uphold the ban rather than strike it down. If the hypotheses stated and tested by these scholars reflected their true views, then *Gonzales* would be inconsistent with these strategic theories. Indeed, these empirical hypotheses contradict the main thesis of Epstein and Knight (1997), which posits that strategic considerations condition the role of ideology and jurisprudence on judicial decisions.

The consequences of this mismatch in theory and empirics are far-reaching. Modelling judicial independence as a direct predictor of judicial review can undermine empirical tests of both the influence of both ideological preferences and judicial independence in a court's probability of striking down a statute. This is especially true for courts that often review statutes they are likely to uphold, such as the U.S. Supreme Court. This creates a large potential for Type 2 error in previous studies and complicates both future research and replication efforts. Indeed, it is unclear how many of the previous null findings in the literature are true nulls versus Type 2 error.

This paper refines current practices of modelling the relationship between judicial independence and judicial review, matching the nuanced theories advanced by scholars with equally nuanced empirical models. I begin by examining the current literature on judicial independence, focusing particularly on how theoretical mechanisms influence a constitutional court's decision to invalidate laws. I next highlight that the common yet underappreciated prediction in these theories that judicial independence does not simply encourage constitutional courts to strike down laws, but rather allows

their own ideological predispositions to guide their decisions in constitutional cases. I then support my claims by analyzing U.S. Supreme Court constitutional decisions on important federal statutes from 1949-2011. The analysis reveals that modelling judicial independence as a conditional predictor significantly improves model fit, corrects Type 2 error in previous interpretations, and reveals that the U.S. Supreme Court is much more sensitive to fluctuations in judicial independence than scholars have previously known. Finally, I conclude with how these results change our understanding of scholarly theories of judicial independence and judicial review.

2.2. Judicial Independence and its Role in Judicial Review

Judicial independence, broadly defined, is a political construction that allows judges to make decisions free from outside influence. As a latent concept, scholars have taken a wide variety of approaches to measurement in empirical research. Many operationalizations of judicial independence focus either on expert descriptions of courts (Stephenson 2003, Linzer and Staton 2015) or indicators that would allow judges to make decisions free from influence, such as the real salary of judges or the budgets provided to courts (Hayo and Voight 2007, Ura and Wohlfarth 2010). But many others focus on judicial review, arguing that a constitutional court's invalidation of a statute, order, or other policy decision is indication of its independence from the other branches of government (Vanberg 2001, 2005, Rios-Figueroa 2007, Clark 2009, Carrubba et al 2015).

While many find the concept of judicial independence normatively appealing, independence is far from guaranteed even within a democracy. The U.S. Congress and

president, for example, can influence the Supreme Court by ignoring or circumventing previous decisions (Epstein and Knight 1997, Meernik and Ignagni 1997), starving the Court of resources like support staff and salary increases (Hayo and Voight 2007; Ura and Wohlfarth 2010), limiting the amount of discretion the Court has in determining its docket (Harvey 2013), pursuing constitutional changes that would damage it, or even impeach the justices (Whittington 2007). Yet while these forms of court-curbing were relatively common in the past (Kramer 2004, McGuire 2004), they rarely occur in the post-War U.S. The puzzle of why Congress and the president continue to tolerate judicial review of its own actions is intriguing and motivates a large literature base explaining judicial independence in general and judicial review in particular.

Scholars have identified a number of determinants of judicial independence. Perhaps the most important driver of judicial independence is the popularity of a court. Elected officials are mindful of public opinion, with some going as far as to describe them as “single-minded re-election seekers” (Mayhew 1974). They are fearful of engaging in activities that would cause them to lose support, which could threaten their chances in the next election. Courts in modern democracies often have broad support among their publics (Gibson, Caldeira, and Baird 1998, Gibson, Caldiera, and Spence 2003, Gibson and Caldiera 2009). This support may cause voters to abandon officials that engage in court-curbing, which in turn insulates courts from the other branches of government who are fearful of losing their jobs. In turn, constitutional courts are free to strike down laws regardless of government preferences (Stephenson 2004, Carruba 2009). In the U.S. context, this view is advocated by supporters of the attitudinal model

of judicial decision-making, arguing that the “negative political consequences, electoral or otherwise, of limiting judicial independence far outweigh whatever short-run policy gains Congress might gain by reining in the Court,” which allows the Court to make decisions solely based on the members’ ideological preferences (Segal and Spaeth 2002, pg. 94).

More recent research shows, however, that that even the Supreme Court is wary of declines in public opinion when deciding to invalidate laws. Clark (2009, 2011) shows that the Court invalidates fewer laws when the number of court-curbing bills increases, a signal of the Court’s popularity. Ura and his coauthors similarly show that the Court’s popularity relative to Congress influences how both institutions approach their interactions with one another (Ura and Wohlfarth 2010, Merrill, Conway, and Ura 2017). Additional comparative evidence shows that constitutional courts are vulnerable to punishment when support is low (Helmke 2010, Helmke and Staton 2011).

Vanberg (2001, 2005) argues that transparency in the political environment moderates the relationship between popularity and judicial review. Public attention to a particular case makes it more difficult for elected officials to circumvent rulings. If the public is not attentive, however, elected officials do not fear public backlash and are free to act as they wish even if the court is popular, a problem if a court’s preferred decision in a case were to bring it in conflict with elected officials. Similarly, if the public is not attentive to a court more generally, executives and legislatures have no incentive to support judicial independence and instead will punish courts that make decisions out-of-step with their preferences. In a number of interviews, Vanberg (2005) shows that both

German high court judges and members of parliament are keenly aware of the political nature of their relationship, with members of parliament adding that they are careful to avoid public scrutiny when attempting to evade court decisions. In quantitative analysis, he also shows that the German constitutional court is more likely to strike laws in salient cases, a finding supported by additional analysis in Mexico (Staton 2006, 2010). Cross-national analysis also finds that countries with higher degrees of press freedom also have more independent judiciaries (Hayo and Voight 2007, Melton and Ginsburg 2014).

Formal protections for constitutional courts, or *de jure* judicial independence, also help secure judicial independence. Formal protections such as salary minimums and guaranteed term length remove tools that can be used to punish a court if it makes a politically unpopular decision. This in turn insulates a court from political pressure and secures judicial independence (Hayo and Voight 2007, Melton and Ginsburg 2014). Supporters of the attitudinal model argue that these formal protections help insulate the Court, allowing it to make decisions solely based on their preferences (Segal 1997). But analysis over a long time horizon indicate that the Court's institutional support was not always so high and, as a result, it invalidated fewer laws (McGuire 2004). Cross-national evidence also finds that protected constitutional courts are more likely to strike down statutes in politically unfavorable circumstances (Carrubba et al 2015).

Political fragmentation can also provide the independence courts need to exercise judicial review. Modeling the U.S., many modern democracies have a separation-of-powers system in which the ability to govern is divided between multiple political entities, like a separately elected executive and legislature. When these various political

bodies are not controlled by the same governing coalition, a government may be unable to retaliate against a court that invalidates its policies and a court is empowered to exercise judicial review (Rios-Figueroa 2007). Evidence supporting the political fragmentation hypothesis is mixed, with observational evidence indicating additive influence, moderating influence, and even no influence whatsoever (Rios-Figueroa 2007, Carruba 2015, Helmke 2010).

In some ways, political fragmentation can be seen as a more basic formulation of Marks' separation of powers model (2015).¹ Marks explained why Congress would tolerate a statutory Supreme Court decision inconsistent with its preferences. Later scholars extended the logic to constitutional decisions (Bergara, Richman, and Spiller 2003; Spiller and Gely 1992, Gely and Spiller 1990). If the pivotal actors in the policy-making process, such as the median member of the House, the median member of the Senate, and the president, all support a law under review, the Court will not try to invalidate it for fear of non-implementation and potential backlash. But if a single pivotal member opposes the law, the court is free to strike it down so long as doing so would not result in a policy environment more extreme than the ideal policy of the dissenting pivotal member(s). There is considerable debate as to whether it has empirical support; proponents of the attitudinal model in particular argue for a negligible relationship (Segal 1997, Segal and Spaeth 2002, Owens 2011, Segal, Westerland, and

¹ This paper went unpublished for many years, leading to an inconsistent timing of publications.

Lindquist 2011, Spiller and Gely 1992, Bergara, Richman, and Spiller 2003, Hall and Ura 2015).

Insurance theory argues that judicial independence will be greater when political competition is high (Stephenson 2003). Competition creates uncertainty for government officials evaluating whether they will be able to keep power. Fearing extreme policies by the opposition, governments support judicial review as an insurance mechanism were they to lose power. This fear of the opposition encourages governments to tolerate judicial review of its own actions and, subsequently, empowers courts to strike laws as they see fit. Insurance theory has considerable empirical support, both qualitative and quantitative (see Vanberg 2015 for a review).

2.3. Independence as a Moderator of Preferences

As mentioned earlier, judicial review has been used as an indicator of judicial independence. To be sure, a truly independent court must not be afraid to strike down the decisions of other actors. But despite its correlation with independence, it is by no means a valid indicator of the concept. Scholars have long noted that governments may desire for courts to strike down laws under certain conditions (Rogers 2001, Whittington 2005). Striking down a law, therefore, is not a perfect indicator of an independent court, as it could just as easily be a court bowing to the pressure of another branch of government (Carrubba, Gabel, and Hankla 2008). In a similar vein, failing to strike a law is not necessarily an indication of a weak judiciary. As the introduction illustrates, just because the U.S. Supreme Court is independent does not mean it strikes down every law that

comes before its docket; sometimes, they uphold laws that are consistent with the judges' preferences.

This last part is an underappreciated prediction made by a number of formal models of judicial review. Consider Mark's separation of powers model (2015). Many scholars interpret this model to mean that when the elected branches are supportive of a particular law, the Court should be less likely to strike it down if it comes under the Court's consideration (Segal, Westerland, and Lindquist 2011). Conversely, the Court should be more likely to strike down a law when at least one pivotal elected official opposes the law. I argue, however, that this characterization of the model omits an important relationship. When a pivotal actor opposes a law under review, the court is free to strike down the law as constitutional and move the status quo towards its ideological preferences. But if the law reflects the preferences of the median member of the Court, then the Court will uphold the law as constitutional and force political opponents to repeal it using normal legislative means. The Court is not forced to strike laws, but rather can "vote its own preferences" (Bergara, Richman, and Spiller 2003).

A similar account can be given for Vanberg's model of political transparency (2001, 2005). A typical description of the model's equilibria states that when a court is sufficiently popular and operates in an environment of political transparency, it is more likely to invalidate legislation (Staton 2006). But this characterization misses an important part of the equilibria. Assuming that the government supports a statute under review, a court with divergent preferences to the legislature will strike down a statute when both popularity and transparency are high; otherwise, that court will uphold a

statute out of fear of court-curbing. A court with convergent preferences to legislature, however, will always uphold a statute under review regardless of its popularity and transparency. The importance of this theoretical prediction is most obvious when phrased in light of a court's ideological preferences: when a court is sufficiently protected from potential court curbing, it is free to act upon its preferences. When those constraints are not high, however, it will ignore its preferences and instead choose to uphold legislation.

I argue that none of the mechanisms of judicial independence discussed above imply simple direct effects on a constitutional court's decision to strike down a statute, as previous studies have assumed in their empirical models. Rather, these mechanisms condition the effect that a court's preferences have on striking a statute: the effect of preferences should be strongest when a court is protected from court curbing and that effect should decline as the court becomes more vulnerable. This leads to a general hypothesis:

Conditional Preference Hypothesis: The relationship between the ideological preferences of a constitutional court towards striking a statute and the probability that the court will strike down a statute is conditioned by the degree of independence that court has from other branches of government, with greater levels of independence leading to a more positive relationship.

While previous studies of judicial independence recognize that it is influential in a court's decision to strike down laws, many of them do not explicitly state its role in conditioning the effect of court's preferences in judicial decision-making (Vanberg

2001, 2005, Staton 2006, 2010, Clark 2009, 2011, Rios-Figueroa 2007, Carruba et al 2015). Likewise, their empirical models do not account for this conditioning relationship and instead test additive relationships between judicial independence and judicial review. This approach can uncover relationships if a constitutional court is generally predisposed to strike a law, as considered by some authors (Rios-Figueroa 2007). Yet most scholars are silent on the issue. The implied theoretical approach of most prior research can be summarized as:

Additive Independence Hypothesis: There is a positive relationship between the degree of independence of a constitutional court and the probability that the court will strike down a statute.

Additionally, the attitudinal model of judicial decision-making, as applied to judicial review, makes a distinct additive prediction. Proponents of the attitudinal model argue that the positive relationship between the Court's ideological predispositions and the ultimate decision in a case are constant. Because the Court is sufficiently protected, variance in the level of independence is inconsequential to judicial decision-making.² This leads to an additional hypothesis:

Additive Preference Hypothesis: There is a positive relationship between the preferences of a constitutional court towards striking a statute and the probability that the court will strike down a statute.

² While Segal, Westerland, and Lindquist (2011) recognize a general notion of strategic interaction in their article, their inferences are based upon a model when the Court's support for a statute has a constant effect on its probability to strike.

2.4. Research Design

In order to test the above hypotheses, I need to analyze a set of constitutional court decisions with measures of both the court's preferences towards invalidating a particular statute and different mechanisms that secure judicial independence. The U.S. Supreme Court provides an excellent test case for two reasons. First, the U.S. Supreme Court is considered one of the most independent courts in the world, as shown by its consistently high levels of legitimacy and its long history of making decisions according to the attitudinal model (Gibson 2008, Segal and Spaeth 2002). This general high level of independence makes it difficult to find evidence for the Additive Independence Hypothesis, in turn making it a prime subject to test the Conditional Preference Hypothesis. Indeed, the difficulty in finding evidence that independence influences the decision-making of the Court makes it one of the most conservative tests of my theory and makes evidence that supports my theory all the more compelling. Second, the Court is the subject of a wealth of research on the ideological preferences of its members over a long period of time, with a particular emphasis on the measures of justice ideal points (Segal and Cover 1989, Martin and Quinn 2002, Epstein, Martin, Segal, and Westerland 2007, Bailey 2008). While comparative research efforts are growing in their ability to collect case data across countries, comparable ideal point estimates for courts or their judges are still unavailable. For these reason, I analyze a subset of U.S. Supreme Court decisions from 1949-2011.

Rather than solely focusing on U.S. Supreme Court decisions, however, this analysis draws on a statute-centered approach of previous studies (Hall and Ura 2015,

Harvey and Friedman 2009, 2006). The study of judicial review inevitably leads to studying court decisions. Solely studying them in presence of a discretionary docket, however, can lead to a selection bias as strategic interactions may happen at the certiorari stage (Friedman 2006). This can negatively impact our ability to make inferences, meaning we must go beyond simply looking at decisions and look at the statutes which the decisions are about. Thus, the unit of observation in this analysis are federal statutes. Of course, there are difficulties with looking at all federal statutes. Collection of the data would be a monumental task and would thus limit analysis to a small time period. As a middle ground, I analyze a subset of statutes enacted between 1949 and 2011. The subset is whether a law is landmark legislation, as defined by Mayhew (2005). This results in 368 statutes, with writs of certiorari granted to constitutional challenges 149 times and subsequent invalidations 55 times.³

In order to account for potential selection effects in the merits stage, as well as examine interesting relationships at the certiorari stage, the model used in this analysis is a Heckman probit model. The first stage is a model of the Court's decision to hear a challenge of an important statute in a given year. The second stage is a model of the Court's decision to invalidate, in part or in whole, the statute on constitutional grounds. This model allows us to control for potential sample selection bias at the merits stage, though it does not allow for us to entangle what social processes are governing whether a

³ Due to constraints on relevant independent variables, only 148 of the 149 Supreme Court decisions are analyzed in the data.

statute is granted a constitutional challenge.⁴ All variables to be described in this analysis are included in both the first and second stage, except those variables that are specific to Court decisions rather than statutes or the extant political environment.

The crucial independent variable in this analysis is the court's preferences towards a law. To measure the court's ideological preferences, I use a combination of Bailey's (2013) ideal point estimates of justices' ideology and the direction of the decision classification from the Supreme Court Database. If striking a statute was consistent with the median member of the court's ideological predisposition, then the observation is assigned the absolute value of the median member's ideal point. If not, then the observation is assigned the negative of the absolute value of the median member's ideal point. All cases where the ideological implications of a decision were unclear were coded as zero. This results in a measure of the court's attitudes towards the case where positive values indicate the court is ideologically inclined to striking and negative values indicate the court is ideologically opposed to striking.

The use of the direction of the decision variable from the Supreme Court Database makes for a particularly compelling test of my theory. Harvey (2013) argues that the strong evidence supporting the attitudinal model in the U.S. Supreme Court can be explained, at least in part, by confirmation bias in the coding of the variable. If this is true, my incorporation of this variable biases my subsequent analysis in favor of finding support for the attitudinal model and away from my own theory. Finding evidence that

⁴ The certiorari process is influenced by a number of actors, including litigants, lower court judges, political elites, and the justices themselves.

supports the Conditional Preference Hypothesis in the face of such a conservative test, then, would provide compelling support for my theory.

Aside from the court's ideological predispositions, I also need measures of the various mechanisms that secure judicial independence.⁵ I include two measures of the Court's popularity in the analysis. First, I include a measure of the Court's popularity relative to Congress, which Ura and his coauthors argue is an important consideration in legislative-judicial interactions (Ura and Wohlfarth 2010, Merrill, Conway, and Ura 2017). The General Social Survey asks respondents to rate the people running different government institutions on a three-point scale, first measured in 1973.⁶ My measure is the average approval for the Court minus the average support for Congress in the previous year. Second, Clark (2009, 2011) argues that court-curbing bills introduced in Congress is a function of public discontent for the Court. I adopt his measure of the number of court-curbing bills introduced in Congress in the previous year; the data begins in 1973.

Vanberg (2001, 2005) has a number of measures of political transparency that should protect politically popular courts like the U.S. Supreme Court. An easily understood policy area should be more transparent than more complex ones. To code statute easiness, I adapt Vanberg's (2001) complexity measure to this analysis. It is a binary measure with any statute whose subject matter dealt with economic regulation,

⁵ One mechanism of judicial independence could not be operationalized in this dataset. The *de jure* protections afforded to members of the Court has remained stable over the Post-War era and is thus not included in this analysis.

⁶ The measure has not been asked annually. In years where the data is missing, it is imputed using the average of the two most proximate years.

state-mandated social insurance, civil servant compensation, taxation, federal budget issues, or campaign finance is coded as complex and given a 0. All others are coded as easy and given a 1. Additionally, Vanberg argues that whether a case has oral arguments is a good indicator of transparency. While this measure works well in the German context, it is less helpful for the U.S. Supreme Court where cases have oral arguments. Instead, I adopt Epstein and Segal's (2000) measure of case saliency as another measure of transparency. It is a binary measure where a 1 indicates that the decision was reported on the front page of the New York Times and 0 otherwise.

In order to test Marks' separation of powers model, I adopt a measure in the literature that estimates whether the current government supports or opposes a given statute under review (Segal, Westerland, and Lindquist 2011, Hall and Ura 2015). I collect the original roll call votes for each public law from VoteView (Lewis et al 2017). Using logit, I then regress these roll call votes on the Common Space Score of Members of Congress and the president (Poole 1998). In order to be consistent with other measures of independence in the study, I run a logit on a vote to oppose the law rather than a vote to support the law. Using the resulting model coefficients, I can then predict the probability that a future Member of Congress opposes a law using their Common Space Score. Note that for those laws passed unanimously or via voice votes in both chambers, there is no variation to run regression models. In these instances, the predicted opposition for all future officials is 0. I then identify pivotal actors in the policymaking process, relying on the insights of Krehbiel (1998), and record the maximum level of predicted opposition to a statute from any of the pivotal actors. I adopt three different

pivot models: the floor median model, the Senate filibuster model, and the party gatekeeping model. Each of these models are outlined in more detail in Hall and Ura (2015). The resulting measure gives the probability that the most hostile pivotal actor opposes the law based on their ideology, as measured by Common Space scores.

Insurance theory argues that political competition protects the court because governments fear extreme legislation from the opposition once they are in power. Unfortunately, it is difficult to test this theory directly when only examining a single political system like the U.S., especially since it has been characterized by competitive elections since the post-War era. An indirect test of this theory, however, is possible even in a single system. Insurance theory argues that fear of future opposition legislation constrains current governments to support judicial review. This implies that the current government and its opposition disagree on policy. But when the government party and opposition party agree on policy, however, insurance theory buckles because being supplanted from power will not result in policy change. Thus, the current government should be constrained to respect judicial review in partisan matters but not bipartisan ones. I measure the partisanship of a statute as the absolute value of the proportion of House Republicans that voted for a statute minus the proportion of House Democrats that voted for the statute. This results in a continuous measure that assigns a 0 when both parties equally support a statute and a 1 when a statute passes on a strict party-line vote.

The political fragmentation literature argues that when political power is divided among opposing entities, courts should be protected from court-curbing. The American system is notably marked by separation of powers, but there is variation in whether those

powers are unified under a single political party. In order to test my theory on political fragmentation, I adopt I include a dummy measure of in which a 1 indicates divided partisan control of the House, Senate, and presidency and a 0 indicates unified.

In addition to these variables of interest, I include a number of controls. A growing body of literature shows that Court decisions are also influenced by ideological tilt of public opinion (Mishler and Sheehan 1993, McGuire and Stimson 2004). Individual perceptions of the legitimacy of the Court are also influenced by their approval of particular decisions (Gibson, Caldeira, and Spence 2003). To control for these relationships in my analysis, I use a combination of Stimson's (1999) public mood and the direction of the decision from the Supreme Court database. First, I mean-center a year lag of public mood for the time period of my analysis so that positive values indicate a liberal public in that time-period and negative values indicate a conservative public. Then, as with the measure of the court's attitude, I assign an observation the absolute value of the transformed public mood if striking is aligned with the public's ideological predisposition. I assign the negative of the absolute value of the transformed public mood if striking is against the public's ideological interests. Positive values mean the public wants a strike and negative values mean the public does not.

I also control model unit effects and the temporal structure of the data. I include two-way fixed effects in both stages of the analysis. The first set controls for the Chief Justice of the Supreme Court who 1) managed the Court for the majority of a given year in the first stage of the analysis, and 2) managed the Court when it decided a particular case the second stage. The second set controls of the policy area of a given statute;

besides a miscellaneous category, these policy areas are agriculture, the budget, civil rights, consumer protection, crime, education, energy and the environment, foreign affairs, good governance, minimum wage, regulation, Social Security, taxes, transportation, and welfare.⁷ Finally, I also include cubic polynomials of the number of years since a constitutional challenge was granted against a statute to control for the duration dependence in the first stage of the analysis, following the advice of Carter and Signorino (2010); these polynomials also serve as the instrument necessary to estimate a Heckman model.

2.5. Analysis

The analysis proceeds in two parts. The analysis is first conducted with a simple additive model in which mechanisms that secure judicial independence are included but not interacted with court ideology. The results of this analysis are contained in Tables 1 and 2. Importantly, court ideology is a robust and relatively stable predictor of whether the court will strike down a statute in the models: a one-unit increase in the court's ideological predisposition to striking down a statute results in roughly 20% increase in the probability of striking in the sample. To help illustrate this example, Justice O'Connor retired in 2005 as the median justice on the Court. Her replacement, Justice Alito, was decidedly more conservative: on the Bailey ideal point scale, his first ideal point measure in 2006 was roughly one unit larger than O'Connor's in 2005. Thus if

⁷ In the popularity models where data is not available until 1973, a few categories could not be included in the analysis due to a lack of variation: consumer protection, foreign affairs, and welfare. Consumer protection was folded into the regulation category, while foreign affairs and welfare were folded into the miscellaneous category.

Alito had become the median justice after replacing O'Connor, the Court would be 20% more likely to strike down liberal statutes and uphold conservative statutes.⁸ This result supports the Additive Preference Hypothesis.

Table 2-1: Heckman Probit Model of Additive Independence and Judicial Review

Stage 2: Invalidations of important federal statutes that are challenged	Relative Court Popularity	Court-Curbing Bills	Statute Easiness	Case Salience
Court Ideology	-0.26 (0.52)	-0.25 (0.53)	1.00** (0.34)	0.77** (0.32)
Independence	2.22 (1.99)	0.01 (0.01)	-1.24 (0.75)	0.91** (0.37)
Public Ideology	0.06* (0.03)	0.06* (0.03)	0.07* (0.03)	0.06* (0.03)
Policy Area Fixed Effects	10.81	11.39	15.51	17.75
Temporal Fixed Effects	0.89	3.46	2.55	4.68
Stage 1: Challenges to important federal statutes				
Independence	-0.38 (0.55)	-0.00 (0.00)	-0.26 (0.12)	-
Policy Fixed Area Effects	70.30**	70.20**	82.83**	78.94**
Chief Justice Fixed Effects	8.03*	8.09*	9.70*	9.53*
Cubic Polynomials of Duration Dependence	62.46**	63.40**	59.22**	59.22**
LR Test of Independent Equations	0.50	0.54	0.51	0.32
N Stage 1	10406	10406	12051	12051
N Stage 2	118	118	148	148

*p<0.05, ** p<0.01, one-tailed tests used where possible

Grouped Coefficients report Wald Test of Joint Significance

Robust Standard Errors are in Parentheses

⁸ While Alito did not become the new Court median when O'Connor retired, the median of the Court has been known to drastically shift with a single retirement. The retirement of Justice Warren and his replacement with Justice Burger created a similarly large shift; the retirement of Justice Kennedy and his replacement with Justice Kavanaugh will likely see a similarly large shift.

In contrast with court ideology, however, the various mechanisms of judicial independence are not statistically significant. The sole exception is the model of case salience. In line with the expectations of the Additive Independence Hypothesis, the coefficient positive and statistically significant: in the sample, the discrete change of moving nonsalient to salient results in a roughly 30% increase in the probability of striking a statute. The lack of statistical significance the other eight mechanisms of judicial independence tested, however, casts doubt on the Additive Independence Hypothesis. While a lack of statistical significance does not necessarily indicate a negligible effect, at minimum it does indicate that the data does not support the Additive Independence Hypothesis (Rainey 2014). The results for court popularity, transparency, and political fragmentation are either partial or total failures of replication. In addition, the analysis would also fail to find evidence for an implication of insurance theory. Were the analysis to end here, one would question whether the mechanisms of popularity, transparency, and political fragmentation, for whatever reason, do not hold up as well in American context or if there is a problem with previous or current analysis.

In addition to the analysis relevant to the articulated hypotheses, there a number of other relevant pieces of information to be gleaned from the tables. The public's ideology is a relatively stable and appreciable predictor of Supreme Court decisions: a standard deviation increase in the public's predisposition to strike leads to a 6% increase in the probability the Court will strike a law. Additionally, some measures of independence are statistically significant in the first stage of the equation, indicating that

they have a net-effect on the certiorari process. Specifically, there is a robust replication that the level of opposition to a statute among pivotal political actors is positively related to probability that the Court will grant certiorari to a constitutional challenge to that statute (Hall and Ura 2015). The level of partisan division of a statute is also positively related to the probability the Court will grant certiorari, likely driven by the strong correlation between partisan and ideological support for statutes.

While individual coefficients of the two-way fixed effects and the cubic polynomials are not reported, Wald tests of their joint significance by group are reported. Both sets of fixed effects are statistically significant in the first stage, but not the second. The cubic polynomials are also statistically significant. This is likely driven by the discrepancy in degrees of freedom in the first and second stages. Even so, the p-values for the policy area fixed effects and the cubic polynomials are statistically significant at the 0.001 level, indicating there is more than just sample size considerations driving these results. Also worth noting is that the likelihood-ratio test of independent equations all fail to reject the null, indicating there is no evidence of the sample selection concerns championed by Friedman (2006), though such tests do not definitively disprove their existence.

There are a few substantive observations we can glean from these control variables. First, the Court is much more likely to grant certiorari in some policy areas than others: the Court is more likely to hear cases on crime, good governance, and Social Security relative to the miscellaneous category and is less likely to hear cases on welfare and foreign affairs. Second, the Court is much more likely to hear a challenge to a law

right after it passes rather than waiting long periods of time, indicating that statutes with dubious constitutionality are considered by the Court swiftly.

Table 2-2: Heckman Probit Model of Additive Independence and Judicial Review, Continued

Stage 2: Invalidations of important federal statutes that are challenged	Floor Median Model	Senate Filibuster Model	Party Gatekeeping Model	Partisan Vote	Political Fragmentation
Court Ideology	0.81** (0.30)	0.80** (0.31)	0.81** (0.28)	0.78** (0.32)	0.88** (0.31)
Independence	-0.32 (0.45)	-0.41 (0.43)	-0.23 (0.47)	-0.23 (0.47)	0.55 (0.34)
Public Ideology	0.06* (0.03)	0.06* (0.03)	0.06* (0.03)	0.06* (0.03)	0.06* (0.03)
Policy Area Fixed Effects	16.37	16.89	15.98	15.98	15.03
Chief Justice Fixed Effects	3.32	3.51	3.22	3.22	3.05
Stage 1: Challenges to important federal statutes					
Independence	0.40** (0.13)	0.37** (0.13)	0.41** (0.12)	0.24* (0.14)	0.01 (0.07)
Policy Area Fixed Effects	81.85* *	81.51**	82.06**	78.86**	79.46**
Chief Justice Fixed Effects	10.23*	10.43*	11.46**	11.14*	9.27*
Cubic Polynomials of Duration Dependence	58.28* *	58.13**	57.93**	56.65**	59.92**
LR Test of Independent Equations	1.13	1.21	0.99	1.01	0.45
N Stage 1	11975	11975	11975	12051	12051
N Stage 2	148	148	148	148	148

*p<0.05, **p<0.01, one-tailed tests used where possible
 Grouped Coefficients report Wald Test of Joint Significance
 Robust Standard Errors are in Parentheses

The results in Tables 3 and 4 are similar to the models as the Tables 1 and 2, but this time including an interaction term between court ideology and the independence variables. There is little change in the control variables and cubic polynomials in the data. The likelihood ratio tests of independent equations also provide no evidence of selection effects. Importantly, the likelihood ratio tests comparing the models in Tables 3 and 4 to their counterparts in 1 and 2 are statistically significant. Most of the likelihood ratio tests in Table 4 are statistically significant at the 0.05 level and, as the replication materials detail, the likelihood ratio tests for case salience and Court popularity are just outside the realm of statistical significance at the 0.05 and 0.10 level, respectively. These tests provide support for the Conditional Preference Hypothesis relative to the other hypotheses.

Like the previous models, the coefficient for the various mechanisms of judicial independence are rarely statistically significant and normally centered around zero. Unlike in the previous models, the coefficient for court ideology has wide variation: the coefficient almost doubles in the political fragmentation model, is statistically insignificant and centered on zero in the pivotal support models, and large and negative in the Court popularity model. These results are inconsistent with the Additive Preference and Additive Independence Hypotheses, which would predict positive, statistically significant coefficients for each set of constitutive variables and a statistically insignificant interaction term centered on zero. In contrast, six of the nine interaction terms are positive and statistically significant. This is again consistent with

the Conditional Preference Hypothesis: as the level of independence increases, the Court's ideological preferences play a stronger role in their decisions.

Table 2-3: Heckman Probit Model of Conditional Independence and Judicial Review

Stage 2: Invalidations of important federal statutes that are challenged	Court Popularity	Court-Curbing Bills	Statute Easiness	Case Salience
Court Ideology	-3.97 (2.02)	-0.97 (0.75)	0.65 (0.44)	-0.02 (0.50)
Independence	2.56 (2.06)	0.02 (0.02)	-1.12 (0.73)	0.96** (0.38)
Court Ideology x Independence	9.90* (5.43)	0.14 (0.09)	0.64 (0.56)	1.23* (0.69)
Public Ideology	0.04 (0.03)	0.06* (0.03)	0.07* (0.03)	0.07* (0.03)
Policy Area Fixed Effects	12.54	12.48	12.98	17.50
Chief Justice Fixed Effects	1.28	4.09	2.91	4.65
Stage 1: Challenges to important federal statutes				
Independence	0.39 (0.55)	0.00 (0.00)	-0.13* (0.07)	-
Policy Area Fixed Effects	70.32**	70.19**	82.82**	78.95**
Chief Justice Fixed Effects	8.05*	8.02*	9.73*	9.52*
Cubic Polynomials of Duration Dependence	62.43**	63.51**	59.24**	59.86**
LR Test of Independent Equations	0.67	0.04	0.49	1.13
LR Test of Multiplicative Specification	2.66	2.18	0.94	3.67
N Stage 1	10406	10406	12051	12051
N Stage 2	118	118	148	148

*p<0.05, **p<0.01, one-tailed tests used where possible
Grouped Coefficients report Wald Test of Joint Significance
Robust Standard Errors are in Parentheses

Table 2-4: Heckman Probit Model of Conditional Independence and Judicial Review, Continued

Stage 2: Invalidations of important federal statutes that are challenged	Floor Median Model	Senate Filibuster Model	Party Gatekeeping Model	Partisan Vote	Political Fragmentation
Court Ideology	-0.49 (0.56)	-0.90 (0.72)	-1.22 (0.82)	-1.56 (0.75)	1.32** (0.44)
Independence	0.10 (0.59)	0.18 (0.65)	0.39 (0.69)	1.48 (0.92)	0.48 (0.33)
Court Ideology x Independence	4.34* (2.13)	5.30* (2.53)	5.60* (2.44)	9.75** (3.29)	-0.96 (0.58)
Public Ideology	0.06* (0.03)	0.06* (0.03)	0.06* (0.03)	0.07* (0.03)	0.06* (0.03)
Policy Area Fixed Effects	21.54	22.55	21.74	25.18*	14.26
Chief Justice Fixed Effects	3.69	2.97	2.40	6.31	3.19
Stage 1: Challenges to important federal statutes					
Independence	0.40** (0.13)	0.37** (0.13)	0.41** (0.12)	0.24* (0.14)	0.01 (0.07)
Policy Area Fixed Effects	81.85**	81.54**	82.11**	78.85**	79.40**
Chief Justice Fixed Effects	10.26*	10.39*	11.41**	11.05*	9.34*
Cubic Polynomials of Duration Dependence	58.20**	57.94**	57.64**	57.23**	60.26**
LR Test of Independent Equations	0.98	0.73	0.63	0.40	0.84
LR Test of Multiplicative Specification	7.51**	10.62**	7.50**	20.74**	2.21
N Stage 1	11975	11975	11975	12051	12051
N Stage 2	148	148	148	148	148

*p<0.05, **p<0.01, one-tailed tests used where possible

Grouped Coefficients report Wald Test of Joint Significance

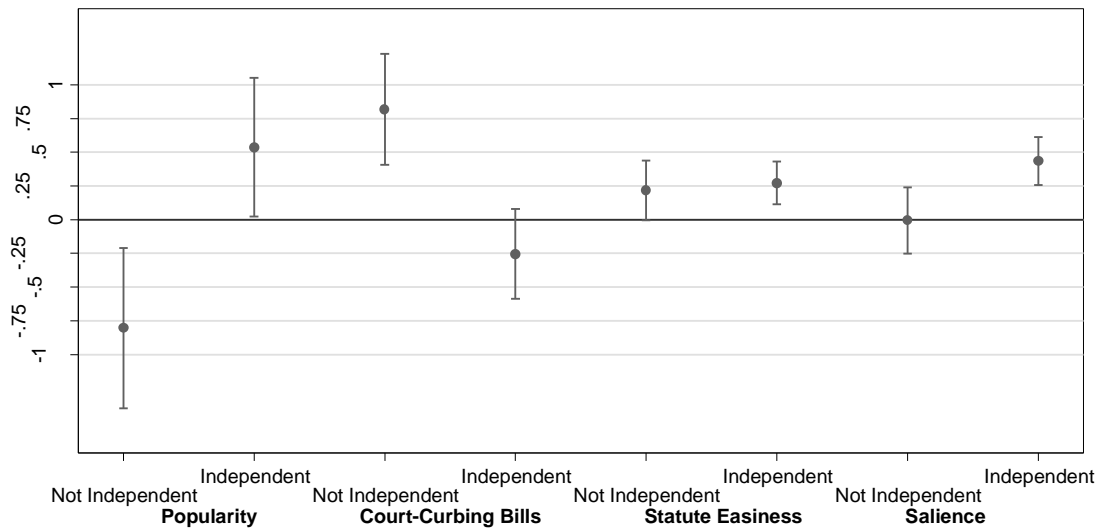
Robust Standard Errors are in Parentheses

To aid in interpreting both the probit model and the interaction terms, Figures 1 and 2 present the average marginal effect of court ideology at the empirical minimum and maximum levels of independence in the data (Hanmer and Kalkan 2013). The results in Figure 1 provide some support the Conditional Preference Hypothesis. When the Court is popular relative to Congress, a one-unit increase in the court's ideological predisposition to strike results in a 50% increase in the probability of striking in the sample, a relationship which disappears when the Court and Congress have similar levels of popularity. Similarly, when the Court considers a case that is salient to the public, a one-unit increase in court's ideological predisposition to strike translates into roughly a 40% increase in the probability of striking; this finding disappears for non-salient cases.

The results in Figure 2 more strongly support the Conditional Preference Hypothesis. When all pivotal policymaking members support a statute, for any of the pivotal policymaker models, court ideology does not have a statistically significant influence on the court's decision to strike a statute. But when a single pivotal member is opposed to a statute, a one-unit increase in the court's ideological predisposition to strike translates into roughly a staggering 90% increase in the probability of striking in the sample. The partisan vote model results are even more extreme. For a bipartisan or nonpartisan statute, court ideology actually has a small negative effect that, with a two-sided test, is statistically significant. For a strictly partisan statute, however, a one-unit increase in court ideology results in a 100% increase in the Court's probability to strike, an empirical prediction that is literally off the charts. These extreme results indicate that

even small changes in the ideological disposition of the Court can have huge consequences on the Court's propensity to strike a law when the Court is independent. These results disappear, however, when the Court is not independent.

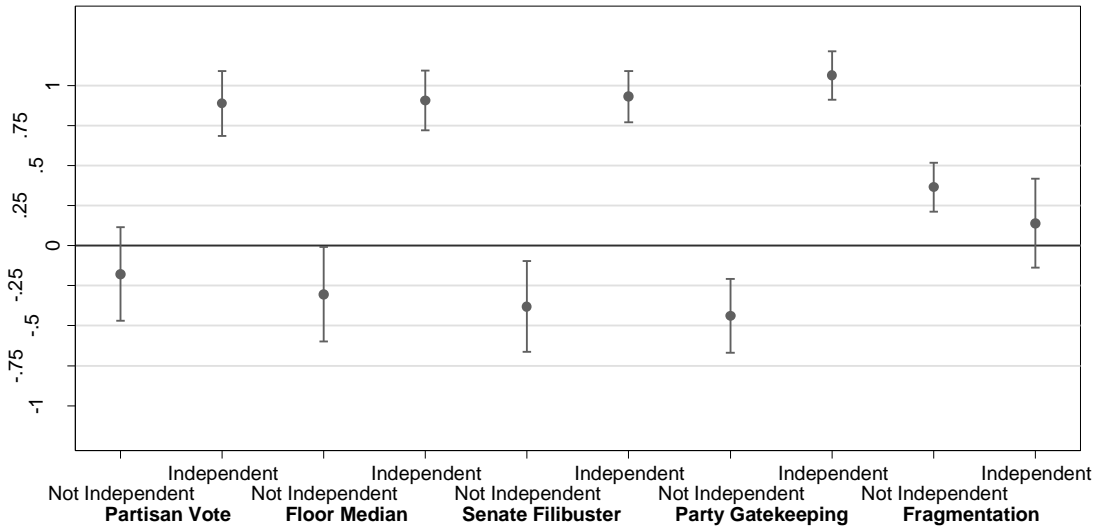
Figure 2-1: Average Marginal Effect of Court Ideology of Table 3, at the Empirical Minimum and Maximum Levels of Independence (90% Confidence Intervals)



The court-curbing model and political fragmentation model do not support the Conditional Preference Hypothesis: the models' relevant coefficients are not statistically significant, and the direction of the relationship (as well as the interaction term) is in the opposite direction as would be expected by theory. While the results do not necessarily show that court-curbing does not play a role in the Court's decision to strike a statute, as detailed by Rainey (2014), it does cast some doubt on these theories. The easiness of a statute's policy area also does not support the model, but this is likely due to the policy area fixed effects included in the model. There is little variation left for the statute

easiness variable to exhibit, and the mechanism supports the Conditional Preference Hypothesis when these fixed effects are removed.

Figure 2-2: Average Marginal Effect of Court Ideology of Table 4, at the Empirical Minimum and Maximum Levels of Independence



2.6. Discussion

This paper provides strong evidence that judicial independence is a conditional predictor of judicial review, rather than additive predictors as tested in previous empirical models. Rather than encouraging the Court to strike down a statute or other government policy, as implied by previous empirical tests of theory, higher degrees of independence for the Court enables it to make decisions based on its own ideological predispositions, whether those predispositions support striking a policy or upholding it. As shown in the tests, the Court is remarkably sensitive to shifts in its independence; the finding is notable given the consistent evidence showing that the Court enjoys high

levels of legitimacy. This evidence is consistent with prior informal discussion of these theories but represents an improvement in both the clarity of the presentation and attempts in empirically modelling them. Indeed, many scholars previous work would either partially or fully fail to replicate absent this advance in empirical modelling.

How might scholars approach the study of judicial independence and judicial decision-making differently in the future? There is a clear need for the integration of the preferences of judges into strategic accounts of judicial behavior, an easy step to take in almost all areas of American politics research. The call is notably more difficult for studies of other courts or comparative studies, where relatively fewer attempts have been made to measure the preferences of judges. Yet there is a clear framework for doing so following the Bayesian ideal point methods used by several scholars (Martin and Quinn 2002, Bailey 2008). Indeed, as databases of decisions for non-U.S. courts becoming increasingly well-kept and available, this barrier is reduced until there is little excuse for not incorporating them.

Independent of the methodological contribution of the paper, the substantive results of the empirical analysis make a couple of notable contributions to the literature. First, the analysis helps resolve a debate about the validity of Marks' separation of powers model for U.S. Supreme Court decision-making. Segal and his coauthors have consistently found that the separation of powers model has no explanatory power on Supreme Court constitutional decisions (Segal and Spaeth 2002, Segal, Westerland, and Lindquist 2011, see also Hall and Ura 2015). But this seems to be due to empirical tests that restrict the government's preferences over statutes under review to having a direct

effect on the decision to strike a law. When the government's preferences are allowed to condition the effects of the Court's ideological preferences, as the theory implies, then there are strong results consistent with both the theory and other research (Bergara, Richman, and Spiller 2003).

Second, the analysis provides additional insight into the nature of political fragmentation. The analysis does not provide evidence that political fragmentation influences the Supreme Court's decision to strike a law. It does, however, provide evidence that ideological and partisan divisions to a statute do influence the Court's decision to strike. These two arguments are similar but have important differences. Implicit within the theory of political fragmentation is the idea that different political parties disagree and should be unable to cooperate to punish a constitutional court. While it is true in the U.S. that the parties have, to varying degrees, always had marked differences in ideology, this does not preclude their ability to agree on some issues and work together. Indeed, the majority of public laws considered in my empirical examination were passed by strong, bipartisan majorities. Political fragmentation does not seem to be either a necessary or a sufficient condition for a court to be protected. It is not necessary in that a party may disagree internally about an issue when it has full control of government, like the Democrats were on racial issues in the civil rights era, and it is not sufficient in that two opposing parties may agree on a particular issue and punish a constitutional court if it invalidates statutes on that issue.

This study is not without limitations. As mentioned in a footnote, not all of the mechanisms for judicial independence are tested. The *de jure* protection afforded to

members of the Court has remained relatively stable over the Post-War era. This lack of variation prevents analysis of these theories in light of the arguments in this paper.

Comparative analysis must be conducted in order to fully evaluate these theories.

There is also a concern about the generalizability of the findings. The research design focuses on statutes that are regarded as important at the time of passage. For the most part, many are also considered landmark statutes in retrospective review. But the focus on important statutes excludes statutes with moderate to minor importance. In these cases, it's entirely possible that the Additive Preference Hypothesis would hold because a government simply would not care about whether a minor statute was struck down. This would be consistent with some models of judicial independence, in which the cost of retaliating against a constitutional court is greater than the benefit received from reenacting a statute (Vanberg 2005). Still, the comparison of statutes with varying degrees of importance would be an interesting avenue for future research.

Additional research should also be conducted on political competition and judicial review. This paper suggests a more nuanced understanding of insurance theory: political competition empowers judicial review of partisan statutes but not bipartisan ones. A crucial assumption made in insurance theory is that political parties have opposing policy desires. While true in many policy areas, it is not difficult to imagine values opposing political parties in democracies might share: democracy, capitalism, a strong national defense, etc. In these areas, governments may be less inclined to tolerate judicial review of its actions. Analysis of the American context supports this claim.

However, additional comparative analysis over a wider range of political contexts would provide more robust support for this argument.

2.7. References

- Bailey, Michael A. 2013. "Is today's court the most conservative in sixty years? Challenges and opportunities in measuring judicial preferences" *Journal of Politics*: 75(3): 821-834.
- Bonneau, Chris W., Thomas H. Hammond, Forrest Maltzman, and Paul J. Wahlbeck. 2007. "Agenda control, the median justice, and the majority opinion on the US Supreme Court." *American Journal of Political Science* 51(4): 890-905.
- Carrubba, Clifford J., Matthew Gabel, Gretchen Helmke, and Andrew D. Martin. 2015. "When parchment barriers matter: de jure judicial independence and the concentration of power." Unpublished Manuscript.
- Caldeira, Gregory A., John R. Wright, and Christopher JW Zorn. 1999. Sophisticated voting and gate-keeping in the Supreme Court. *Journal of Law, Economics, and Organization* 15(3): 549-572.
- Clark, Tom S. 2009. "The Separation of Powers, Court-curbing and Judicial Legitimacy." *American Political Science Review* 54: 971-989.
- Clark, Tom S. 2011. *The Limits of Judicial Independence*. Cambridge University Press.
- Epstein, Lee and Jack Knight. 1997. *The Choices Justices Make*. Sage Press.
- Epstein, Lee, William M. Landes, and Richard A. Posner. 2013. *The behavior of federal judges: a theoretical and empirical study of rational choice*. Cambridge: Harvard University Press.

- Epstein, Lee, Andrew D. Martin, A. D., Jeffrey A. Segal, and Chad Westerland. 2007. The Judicial Common Space. *The Journal of Law, Economics, and Organization* 23(2), 303-325.
- Epstein, Lee and Jeffrey A. Segal. 2000. "Measuring Issue Saliency." *American Journal of Political Science* 44 (1): 66-83.
- Friedman, Barry. 2006. "Taking Law Seriously." *Perspectives on Politics* 4(2): 261-276.
- Gibson, James L., Gregory A. Caldeira, and Vanessa A. Baird. 1998. "On the Legitimacy of National High Courts." *American Political Science Review* 92 (2): 343-358.
- Gibson, James L., Gregory A. Caldeira, and Lester K. Spence. 2003. "Measuring Attitudes toward the United States Supreme Court." *American Journal of Political Science* 47(2): 354-367.
- Graber, Mark A. 1993. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary." *Studies in American Political Development* 7:35-73.
- Hall, Matthew E. K., and Joseph D. Ura. 2015. "Judicial Majoritarianism." *The Journal of Politics* 77 (3): 818-832.
- Hansford, Thomas G., James F. Spriggs, and Anthony A. Stenger. 2013. "The Information Dynamics of Vertical Stare Decisis." *The Journal of Politics* 75(4): 894-906.
- Harvey, Anna. 2013. *A Mere Machine: The Supreme Court, Congress, and American Democracy*. New Haven: Yale University Press.

- Harvey, Anna, and Barry Friedman. 2006. "Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000." *Legislative Studies Quarterly* 31:533–562.
- Harvey, Anna, and Barry Friedman. 2009. "Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court's Agenda." *The Journal of Politics* 71: 574–592.
- Hanmer, Michael J., and Kerem O. Kalkan. 2013. "Behind the Curve: Clarifying the Best Approach to Calculating Predicted Probabilities and Marginal Effects from Limited Dependent Variable Models." *American Journal of Political Science* 57 (1): 263-277.
- Hayo, Bernd, and Stefan Voigt. 2007. "Explaining de facto judicial independence." *International Review of Law and Economics* 27 (3): 269-290.
- Helmke, Gretchen. 2010. "Public Support and Judicial Crises in Latin America." *University of Pennsylvania Journal of Constitutional Law* 13 (2): 397-412.
- Helmke, Gretch, and Jeffrey Staton. 2011. "The Puzzling Judicial Politics of Latin America." in *Courts in Latin America*, edited by Gretchen Helmke and Julio Rios-Figueroa. London: Cambridge University Press.
- Kramer, Larry D. 2004. *The people themselves: popular constitutionalism and judicial review*. London: Oxford University Press 2004.
- Maltzman, Forrest, James F. Spriggs, and Paul J. Wahlbeck. 2000. *Crafting law on the Supreme Court: The collegial game*. London: Cambridge University Press.

- Mayhew, David R. 2005. *Divided We Govern: Party Control, Lawmaking and Investigations, 1946–2002*. 2nd ed. New Haven, CT: Yale University Press.
- McGuire, Kevin T. 2004. "The Institutionalization of the US Supreme Court." *Political Analysis* 12(2): 128–142.
- McGuire, Kevin T., and James A. Stimson. 2004. "The least dangerous branch revisited: New evidence on Supreme Court responsiveness to public preferences." *Journal of Politics* 66 (4): 1018-1035.
- Melton, James and Tom Ginsburg. 2014. "Does De Jure Judicial Independence Really Matter?" *Journal of Law and Courts* 2 (2): 187-217.
- Merrill, Alison Higgins, Nicholas D. Conway, and Joseph Daniel Ura. 2017. "Confidence and Constraint: Public Opinion, Judicial Independence and the Roberts Court." *Washington University Journal of Law and Policy* 54: 209-228.
- Mishler, William, and Reginald S. Sheehan. 1993. "The Supreme Court as a countermajoritarian institution? The impact of public opinion on Supreme Court decisions." *American Political Science Review* 87(1): 87-101.
- Pildes, Richard H. 2011. "Is the Supreme Court a Majoritarian Institution?" *Supreme Court Review* 2010 (1): 103–58.
- Rios-Figueroa, Julio. 2007. "Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994-2002." *Latin American Politics and Society* 49 (1): 31-57.

- Rogers, James R. 2001. "Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction." *American Journal of Political Science* 45: 84–99.
- Segal, Jeffrey A. 1997. "Separation-of-Powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91(1): 28-44.
- Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
- Segal, Jeffrey A., Chad Westerland, and Stefanie A. Lindquist. 2011. "Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model." *American Journal of Political Science* 55 (1): 89-104.
- Spiller, Pablo T., and Rafael Gely. 1992. "Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988." *The RAND Journal of Economics* 23:463-492.
- Staton, Jeffrey K. 2006. "Constitutional Review and the Selective Promotion of Case Results." *American Journal of Political Science* 50 (1): 98-112.
- Staton, Jeffrey K. 2010. *Judicial Power and Strategic Communication in Mexico*. London: Cambridge University Press.
- Stephenson, Matthew C. 2003. "'When the Devil Turns ...': The Political Foundations of Independent Judicial Review." *The Journal of Legal Studies* 32 (1): 59-89.
- Stephenson, Matthew C. 2004. "Court of Public Opinion: Government Accountability and Judicial Independence." *Journal of Law, Economics, and Organization* 20 (2): 379-399.

- Stimson, James A. 2004. *Public Opinion in America: Moods, Cycles, and Swings*.
Boulder: Westview Press.
- Ura, Joseph D. and Patrick C. Wohlfarth. 2010. "'An Appeal to the People': Public
Opinion and Congressional Support for the Supreme Court." *Journal of Politics*
72(4):939-956.
- Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to
Constitutional Review." *American Journal of Political Science* 45: 346–361.
- Vanberg, Georg. 2005. *The Politics of Constitutional Review in Germany*. London:
Cambridge University Press.
- Vanberg, Georg. 2015. "Constitutional Courts in Comparative Perspective: A
Theoretical Assessment." *Annual Review of Political Science* 18: 167-185.
- Whittington, Keith E. 2005. "'Interpose Your Friendly Hand': Political Supports for the
Exercise of Judicial Review by the United States Supreme Court." *American
Political Science Review* 99: 583–96.
- Whittington, Keith E. 2009. *Political Foundations of Judicial Supremacy: The
Presidency, the Supreme Court, and Constitutional Leadership in US History*.
New Haven: Princeton University Press.

3. PRESIDENTS, LEGISLATURES, AND MAJORITARIAN JUDICIAL REVIEW

3.1. Introduction

Political scientists have argued that the U.S. Supreme Court is a majoritarian institution in nature since at least Dahl's seminal work on the matter (1957). Dahl originally argued this because the Court rarely invalidates laws passed by current elected officials, instead choosing to uphold laws or invalidate laws passed by previous administrations. This line of thought has since been extended by scholars who argue that judicial review itself can be majoritarian: elected officials sometimes prefer the Court to invalidate their laws rather than uphold them (Rogers 2001, Whittington 2005, 2007, Fox and Stephenson 2011). While there are many mechanisms by which judicial review can be majoritarian, the underlying argument in the literature is the same: elected officials can achieve their policy goals by relying on the constitutional court's ability to invalidate statutes rather than pursue policy change.

Within the scholarship on majoritarian judicial review, however, there are two distinct strands. The first focuses on the benefits judicial review can provide to legislatures (Rogers 2001, Fox and Stephenson 2011). Legislatures are usually vested with policymaking authority in democracies, making them the most obvious beneficiaries of majoritarian judicial review. Importantly, these studies normally treat legislatures as if they were unitary institutions with sole policymaking authority. They often rely on game-theoretic analysis in order to elucidate their arguments.

The second strand of scholarship, primarily advanced by Whittington (2005, 2007) explicitly focuses on the benefits judicial review can provide to executives. In particular, he argues that U.S. presidents, as elected officials with considerable interest and influence in policy outcomes, can benefit from majoritarian judicial review as well. Importantly, he advances a number of claims as why the Supreme Court might be motivated to advance the policy goals of the president, some of which are unique to that office. This strand of scholarship is usually supported by case studies.

These two strands of scholarship are not necessarily competitive. Constitutional courts can generally support both legislators and executives when using judicial review, especially when there is policy agreement between the two branches on a particular issue. But policy agreement between branches of government is far from guaranteed in presidential systems. Furthermore, there are unique reasons why a constitutional court might support one branch over another driven by the design of those institutions. Legislatures provide material incentives and better represent public opinion; in contrast, the executive's unilateral control over the varied functions of its office allow for more targeted persuasion on a given issue. Given these differing incentives constitutional courts face when considering majoritarian judicial review, which branch of government does a court support?

This paper joins these two separate strands of the literature into a comprehensive account of majoritarian judicial review that focuses on the structure of political institutions. I start by reviewing the general principals of majoritarian judicial review while also identifying the specific mechanisms in the literature. I next distinguish

between legislative-focused and executive-focused majoritarian judicial review in presidential systems, highlighting why a constitutional court might prefer to advance the policy goals of legislators rather than the executive and vice versa. During this, I survey the evidence supporting majoritarian judicial review for each branch within the American context. I then craft a couple of hypotheses about how majoritarian judicial review should function and test them using a set of U.S. Supreme Court constitutional decisions on important federal statutes from 1951-2011. The analysis finds evidence for both executive-focused and legislative-focused judicial review, though the stronger evidence is certainly for the presidency. I close by discussing some limitations of the study and areas of future research.

3.2. Motivations for Majoritarian Judicial Review

Majoritarian theories of judicial review developed as a response to the long-standing criticism that the U.S. Supreme Court is a countermajoritarian institution (Bickel 1986). Because unelected judges can use judicial review to invalidate the actions of elected officials, judicial review is illegitimate in a democratic society. This has led many positive scholars to study judicial independence; if judicial review is countermajoritarian, only independent courts can exercise it (Vanberg 2001, Stephenson 2003). Majoritarian theories of judicial review argue that while the constitutional courts may issue the occasional countermajoritarian decision, elected officials tolerate them because of the benefits judicial review provides in advancing their policy goals. Elected officials, of course, have other tools to create policy change. In the right circumstances,

however, the prospect of a friendly court invalidating undesirable legislation may be preferable to direct action.

There are a number of mechanisms by which elected officials can benefit from judicial review. Rogers (2001) argues that uncertainty in the political environment can make judicial review desirable for elected officials. When there is a large degree of uncertainty about the true policy consequences of a statute, legislatures will defer to the judgement of more informed, ideologically congruent constitutional courts. Courts can generally be thought of as having better information because it has access to the same information as elected officials plus the additional information gathered through the legal process, such as the post-enactment information gathered because of the “standing” doctrine in common law courts.

Other majoritarian theories argue that elected officials might desire judicial review on divisive topics (Graber 1993, Whittington 2005). While political parties are organized around agreement on policy issues, there are times when certain issues can internally divide a party. Such issues threaten to tear apart a governing party if it came to blows, encouraging party leaders to allow a constitutional court to make the final decision on a statute even if it means allowing the court to strike down a statute. This can occur by either refusing to pass new legislation in favor of judicial action or nominally passing legislation with the expectation that the court will have the final say on the matter.

Elected officials may also desire constitutional courts to use judicial review to address situations in which different officials disagree on a policy area. During times of

divided government, politicians may look to a constitutional court to overcome entrenched interests preventing new legislation or to undo the policy compromises necessary to achieve legislation. Similarly, dominant national coalitions may look to a court to enforce its policy agenda onto subnational entities with diverging preferences (Whittington 2005, 2007). Judicial review may provide a valuable means of policymaking when traditional means are unavailable.

Judicial review can also create a moral hazard for elected officials (Salzberger 1993, Whittington 2007, Fox and Stephenson 2011). Politicians in democracies are highly concerned with public opinion, with some going as far as to describe them as “single-minded re-election seekers” (Mayhew 1974). Sometimes, however, politicians may desire to veto bills or repeal statutes that are politically popular. In order to do so, they may instead rely on a constitutional court to strike a law, shifting the blame from themselves to an institution that is relatively insulated from public opinion.

While the theoretical motivations for each of these mechanisms are distinct, they share a common, conditional structure. Specifically, judicial review has majoritarian benefits only when elected officials and a constitutional court share similar ideological preferences (Rogers 2001, Whittington 2005). Because a constitutional court functionally has the final say on the fate of a particular piece of legislation, elected officials must be able to trust that the court will make a decision with their best intentions at heart. Otherwise, elected officials will either forgo passing legislation or threaten the independence of courts so that they will not do anything but validate the constitutionality of laws. Therefore, we should only observe a constitutional court

striking laws in a majoritarian manner when it shares similar preferences with elected officials.⁹

To illustrate majoritarian judicial review as a general mechanism, it is useful to reference the politics of the Bipartisan Campaign Reform Act of 2002. The bill sought to address rising campaign spending in elections by imposing a host of regulations on how national parties, corporations, and unions could raise and spend money. President Bush and other party leaders did not like the bill. Campaign contributions from corporations and other sources of soft money greatly benefitted Republicans, including Bush himself during his campaign for president. Indeed, the party had a history of its leaders opposing these reform efforts, including his father George H.W. Bush during his tenure as president (Gooding 2004). And if passed, the implementation of the bill would be largely beyond the control of elected officials. Campaign regulations are enforced by the Federal Election Commission (FEC), an agency designed to be insulated from political pressure.

But vetoing the bill would have its own consequences. Promoted as a solution to corruption and elitism in politics, the bill became increasingly popular with the public after a series of scandals highlighted the need for reform as well as advocacy for the measure during the 2000 presidential election (Gitell 2003). Furthermore, one of the bill's longtime advocates was Senator John McCain. An opponent of Bush in the presidential primary two years before, McCain lost after a series of unusually cruel and slanderous attack advertisements many Republican moderates believed to be a core part of Bush's

⁹ Not all scholars view the similarity of preferences as necessary to majoritarian judicial review; see Graber (1993) and Fox and Stephenson (2011).

campaign strategy (Gooding 2004). While vetoing the bill would garner a policy win for the president and other party leaders, it would have cost them in the form of public backlash and creating deeper divisions between party leadership and moderates.

Rather than veto the bill or delegate to the FEC, Bush signed the bill while expressing his desire for the Court to judge its constitutional merits. In his signing statement, he praised the aims of the bill while criticizing a number of provisions. He particularly emphasized constitutional challenges to the bill, saying it severely restricted free speech and expressed his wish “that the courts will resolve these legitimate legal questions as appropriate under the law” (2002). By doing so, he avoided all costs associated with a veto. At the same time, he signaled his intention to entrust ultimate responsibility for the law to the judiciary.

Initially, the Supreme Court upheld the constitutionality of parts of the law in *McConnell v. FEC* (2003). But after a few appointments by Bush, the conservative Court began to dismantle the law. The Court first invalidated prohibitions on issue advertisements by corporations and unions in *FEC v. Wisconsin Right to Life* (2007). It then invalidated the “millionaire’s amendment” in *Davis v. FEC* (2008). Finally, the Court invalidated the prohibition of corporate and union election spending beyond normal contribution limits in *Citizens United v. FEC* (2009), paving the way for Super PACs to dominate election spending. A clear example of majoritarian judicial review, it is important to note that Bush only signed the bill because of the political costs of preventing its passage and the increasingly conservative nature of the Court. Had there been no costs to a veto – or if the Court had been overwhelmingly liberal – Bush would

have likely vetoed the bill instead and the Court would not have had an opportunity to strike down the legislation.

3.3. Majoritarian Judicial Review in Presidential Systems

In most presentations of majoritarian judicial review, elected officials are treated as if they occupy a unitary branch of government (Salzberger 1993, Rogers 2001, Fox and Stephenson 2011). This occurs for a number of reasons. Scholars may desire to focus on legislative-judicial politics, a worthy area on study, and omit the executive for expository purposes (Salzberger 1993, Rogers 2001). Scholars might also create formal models that use a unitary elected official as a simplifying tool to make solutions more tractable (Rogers 2001, Fox and Stephenson 2011).

Regardless of the reason why elected officials are treated as monoliths, this approach is problematic. Democratic governments that are functionally unitary actors are rarely subject to judicial review from a constitutional court. While the policymaking authority in the United Kingdom is largely dominated by the House of Commons, for example, subsequent legislation is not subject to judicial review because there is no formal constitution and its constitutional court is subservient to parliament. Rather, policymaking authority in most countries with independent constitutional courts is formally separated to different branches of government that are separately survivable. While the German Federal Constitutional Court, the *Bundesverfassungsgericht*, can evaluate the constitutionality of hypothetical and actual legislation, such legislation must be approved by both of the national legislatures of Germany, the Bundestag and the Bundesrat, whose members are selected independently of each other.

One of the most common political systems with split policymaking authority are presidential systems. The executive and the legislature are independently selected and share authority to create law, a separation of powers designed to check tyranny. These systems can have a dominant national coalition, as the U.S. Democratic Party had through much of the twentieth century. But these systems can also have different branches controlled by different political parties. Even copartisans can face severe disagreements, as was the case with Jimmy Carter and Democrats in Congress during the 1970's. Scholars must take into account this potential for disunity when promoting theories of majoritarian judicial review.

In contrast to much of the literature, Whittington (2007) focuses on majoritarian judicial review from a presidential perspective rather than a legislative one. He argues that the president has a number of tools to incentivize courts to help promote a policy agenda, some of which are unique to the president; this, in turn, leads to him finding evidence consistent with executive-focused judicial review. But while his coverage of executive-judicial relations is robust, parallel coverage of legislative-judicial relations is largely absent. No consideration is given to unique mechanisms supporting legislative-focused majoritarian judicial review. Likewise, there is no attempt to find evidence either supporting or failing to support legislative-focused judicial review. This, in turn, undermines his evidence of executive-focused majoritarian judicial review, as it is equally possible that such evidence merely supports the existence of some general form of majoritarian judicial review.

How does the separation of powers influence majoritarian judicial review in presidential systems? Both the executive and the legislative branches are driven by policy goals. Both can substantially influence policy.¹⁰ And both may prefer judicial action over direct action in certain circumstances, as previously described. Given the possibility of conflicting preferences, which branch does a constitutional court support in practice? To answer this question, I look at the American context to interrogate distinct reasons why the U.S. Supreme Court might support a particular branch.

3.4. Congress – The Purse and Public Opinion

As the legislature, Congress has the final say on whether potential legislation becomes law. Within its broad authority of “the purse”, Congress can pass legislation that serves either as a carrot or a stick to judicial efforts. Congress can grant pay increases, resources and support, and docket discretion all through ordinary legislation. On the flip side, Congress can limit financial resources, increase judicial workloads, and, outside of the legislation, even impeach justices (Rosenberg 1992). And while the president can veto legislation, a determined Congress can override a veto. If Congress can exercise these powers, a forward looking Court has substantial incentive to do Congress favors including striking undesirable laws for Congress

Whether Congress can exercise these powers, however, is a different question. Most court-curbing legislation stalls in a committee (Clark 2009, 2010). Those that do gain substantial traction and even pass are historically supported by the president

¹⁰ While the legislature has formal authority over policymaking, presidents have both formal and informal powers that can be used to influence policy as well.

(Whittington 2007). And while Congress can override a presidential veto, the onerous supermajority requirements to do so may prove impossible for most court-curbing efforts. While in theory Congress has a number of tools to punish the Court, in practice Congress may not be able to use them to garner any meaningful influence.

More likely, court-curbing measures may be a valuable signal of public opinion to the Court. Popular election requires Members of Congress to know a great deal about public opinion; Mayhew describes them as “single-minded reelection seekers” (1974). Clark (2009, 2010) argues that this electoral connection leads to Congress being relatively more informed about public opinion than the Court. A number of studies indicate that the Court is sensitive to public opinion, due to its effect on legitimacy (Bryan and Kromphardt 2016, Casillas, Enns, and Wohlfarth 2011, McGuire and Stimpson 2004). If Congress prefers the Court to invalidate a statute under review, the Court may interpret this as a signal of the public’s desires as well.

Of course, the president is also an elected official. But presidential elections are less frequent than congressional ones, leading the president’s preferences to be more out of line than Congress’. In addition, presidents are term limited; the actions of a lame duck president may not reflect public opinion because the president will not be up for reelection. In contrast, Members of Congress are not term limited and face consistent pressures to follow public opinion. Thus while presidential actions may also signal public opinion, that signal is almost certainly weaker.

None of the preceding discussion is to suggest that Congress is itself a unitary actor. Congress is a bicameral institution with independently elected houses that can also

have competing preferences. It is possible that each house could also have distinct influence of majoritarian judicial review, a fact not lost on scholars. Harvey (2013) argues that the Court should be sensitive to the preferences of the House of Representatives rather than the Senate. Because the House controls the beginning of the appropriations and impeachment process, it has more control over the tools used to influence judicial decision-making. The entire membership of the House is also up for reelection every two years, while the Senate is fully replaced over a six year cycle; this greater frequency of election likely makes House action more representative of public opinion (Clark 2010). Thus any account that distinguishes between the president and congressional influence, at minimum, consider the differences in the influence of the House of Representatives and the Senate.

There are notable examples of legislative-focused majoritarian judicial review. Congress has historically deferred to the courts on the divisive issues of slavery, antitrust law, and abortion in order to avoid political infighting that could damage majority coalitions (Graber 1993). Congress also relied on the Court to sort out the complex and competing property rights claims during the settlement of the Louisiana Purchase in the beginning of the nineteenth century rather than reconcile complex and contradictory federal statutes on the matter (Whittington 2007). And Congress engaged in blatant political posturing when passing the Flag Protection Act by a near unanimous margin in the late 1980's; the statute, which contradicted the case *Texas v. Johnson* (1989) that was decided just a few months prior to passage, was subsequently invalidated (Whittington 2007). While these examples are certainly illustrative of majoritarian judicial review, it

is unclear whether they are part of a systematic effort by the Court to invalidate statutes to aid Congress or simply idiosyncratic outliers.¹¹

3.5. The President – Executive without Equal

One of the primary advantages of the executive branch is its hierarchical nature. The president controls almost every aspect of the executive branch and its powers, both formal and informal. And because of this unified control, the Court can easily understand the preferences of the president concerning legislation that the Court. Presidents have regularly vetoed legislation since the founding on constitutional grounds, usually with written or oral statements saying as much. Expanding beyond vetoes, presidents have increasingly issued signing statements to indicate constitutional concerns with a statute that is nonetheless enacted into law. As Whittington argues, these statements “are generally offered for later judicial consumption, in the hopes that the courts will either use the presidential statement as part of the legislative history of the statute that might guide its interpretation or take its signal to review the legislation and authoritatively settle any constitutional issues raised” (2007).

Of course, such messages are not exclusive to the president; Members of Congress can also publicly voice constitutional concerns with pieces of legislation. But such voices can be drowned by proponents of legislation supporting its constitutional grounds or suffocated by the indifference of their peers. While some Members of

¹¹ The exception is Lindquist and Corley (2012), which shows that the U.S. Supreme Court strikes state laws more often when Congress opposes those laws. This is consistent with the Court enforcing the will of national coalitions on the states.

Congress are certainly more influential than others – such as the Speaker of the House and the Senate Majority leader – their objection to a bill might not be shared by their colleagues and thus either ignored by the Justices or not expressed whatsoever. And even if an important plurality of Members share the same views, it still may not be enough to overcome congressional inertia. Compared to his peers in Congress, the president may be in a unique position to prime the Court to exercise judicial review on its behalf.

Beyond the ability to express views on legislation, the president also has ample capacity to persuade the Court using traditional legal means. The president controls the Solicitor General’s office, described by many as “the finest law firm in the nation” (Black and Owens 2012). Using its unmatched resources and expertise, the Solicitor General is highly effective at convincing the Court to support the president’s position when a party in a case. The president may refuse to defend a law, such as Obama did when the Defense of Marriage Act was challenged, which undermines the chances of that law surviving. Even when not directly a party, the Solicitor General’s office regularly influence outcomes by filing amicus briefs. And the president can use the Department of Justice’s resources to support litigation when it does not take an official stance on a case, as Franklin D. Roosevelt’s Civil Rights Section of the Department of Justice did when supporting the NAACP’s efforts in *Smith v. Allwright* (1944) (McMahon 2004). Congress has no clear analogue to the Department of Justice and, as a result, is gravely behind in their ability to persuade the Court using legal means.

The president also nominates individuals to become justices when there are open Court seats. While the Senate must confirm nominees to the Court, the president's power of nomination grants the president large control over who does and does not become a justice. This power allows the president to appoint justices that are ideologically similar, making majoritarian judicial review more likely. Sitting justices may also feel loyalty to the president who nominated them, privileging their views over other elected officials and even sound legal doctrine. Epstein and Posner (2016) find that justices of both parties are more loyal to appointing presidents than their successors, which they attribute to the gratitude the justices feel for being nominated to the bench. This psychological attachment, even if only relevant for a single justice in a given case, may be enough for the Court to ultimately strike a law not favored by the president.

The executive branch also implements statutes and Court decisions (Whittington 2007). This responsibility can be shirked when implementation runs counter to the president's goals. In particular, a president's refusal to implement a statute on constitutional grounds has spurred a significant legal scholarship debating the subject (see Burgess 1993, Johnsen 2000, Prakash 2008). The refusal to implement a law may remove any policy incentive the Court has to uphold a law the president opposes; if there are legal and political incentives to strike a law, those incentives may now be decisive in judicial decision-making. Similarly, the Court may not decide a case according to its sincere preferences, legal or ideological, if the president is unlikely to implement them. Hall (2014) shows that when implementation of a decision falls outside of the judiciary, the Court more strongly values the preferences of elected officials and the public.

Of course, Congress can also interfere with the Court's incentives by refusing to implement decisions. Congress has routinely passed veto-proof legislation designed to contradict Supreme Court decisions, as the Religious Freedom Restoration Act of 1993 did to *Employment Division v. Smith* (1990). Congress also regularly ignores previous Court rulings when drafting new legislation. When the Court invalidated the one-house legislative veto in *Immigration and Naturalization Service v. Chadha* (1983), Congress did not seem to notice. It refused to amend existing laws including such a provision and continued to pass new laws containing them (Epstein and Knight 1998). Thus while the president has power to influence the Court via nonimplementation, that power is far from unique.

Whittington (2007) provides a number of examples for executive-focused judicial review as he argues that the Court caters to presidential preferences. Democratic Presidents Truman and Kennedy avoided an intraparty split on civil rights issues by deferring to Court rulings on these issues. President Cleveland relied on judicial review to undo policy compromises on the income tax; President Clinton did the same on obscenity laws. And presidents have historically looked to the Court to buttress executive authority over defense and foreign policy during times of divided government. But while Whittington supports his argument with case studies, there has yet to be a systematic demonstration of majoritarian judicial review on behalf of the president or an absence of majoritarian judicial review on behalf of Congress.

3.6. Research Design

There are two distinct interpretations of majoritarian judicial review in presidential systems. One interpretation would focus the relationship between the judiciary and the legislature, while the other would focus on the relationship between the judiciary and the executive. These interpretations are not necessarily mutually exclusive; a constitutional court can attempt to advance the policy goals of both branches, although it cannot do both in every case. But the motivations for assisting either branch of government are largely unique and inspire separate hypotheses about judicial behavior, especially since these branches of government can have conflicted policy preferences. Thus, there are two distinct hypotheses to consider:

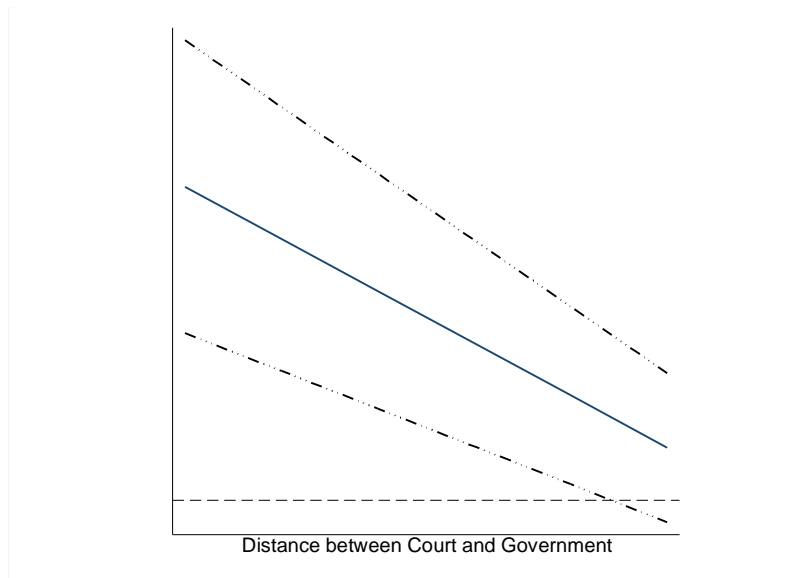
Legislative-Focused Majoritarian Judicial Review: There is a positive relationship between a constitutional court's probability of striking a statute and political circumstances in which the legislature prefers judicial review over direct policy action when the two branches have similar policy preferences. This relationship should decline as the distance between the preferences of the court and the legislature increase.

Executive-Focused Majoritarian Judicial Review: There is a positive relationship between a constitutional court's probability of striking a statute and political circumstances in which the executive prefers judicial review over direct policy action when the two branches have similar policy preferences. This relationship should decline as the distance between the preferences of the court and the executive increase.

As a conditional hypothesis, the most straightforward test would be to use multiplicative interactions and plot the conditional marginal effects (Brambor, Clark,

and Golder 2006). An example of a marginal effect plot that supports these hypotheses is presented in Figure 1. When the Court and elected officials have identical preferences – or when the distance between their preferences is minimized at zero – political circumstances that favor majoritarian judicial review increase the probability that a law is invalidated. But as preferences becoming increasing dissimilar – or the distance between the two grows – the marginal effect declines until it becomes statistically indistinguishable from zero.

Figure 3-1: Example of Marginal Effect Plot Supportive of Hypotheses



In order to test these two hypotheses, I need to analyze a set of constitutional court decisions in a presidential system with measures of both the distance between the court’s ideological preferences and those of elected officials as well as measures of political contexts in which elected officials may rely upon majoritarian judicial review.

U.S. Supreme Court decisions, which are made in the context of a presidential system of government, are ideal for at least two reasons. First, significant scholarly attention has been given to the ideal point measures of Supreme Court justices, Members of Congress, and the president in the same ideological space (Epstein, Martin, Segal, and Westerland 2007, Bailey 2007). Second, all of the majoritarian theories described were written with the Supreme Court in mind, as all of the qualitative evidence supporting these claims comes from it; it thus provides the natural test case. For these reason, I analyze a subset of U.S. Supreme Court decisions from 1951-2011.

Rather than solely focusing on U.S. Supreme Court decisions, however, this analysis draws on a statute-centered approach of previous studies (Hall and Ura 2015, Harvey and Friedman 2006, 2009). The study of judicial review inevitably leads to studying court decisions. Solely studying them in presence of a discretionary docket, however, can lead to a selection bias as strategic interactions may happen at the certiorari stage. This can negatively impact our ability to make inferences, meaning we must go beyond simply looking at decisions and look at the statutes which the decisions are about. Thus, the unit of observation in this analysis are federal statutes. Of course, there are difficulties with looking at all federal statutes. Collection of the data is prohibitively costly and would thus limit analysis to a small time period. As a middle ground, I analyze a subset of statutes enacted between 1951 and 2011. The subset is whether a law is landmark legislation, as defined by Mayhew's "Sweep 1" process (2005). This results in 358 important laws, with writs granted 141 times and invalidations by the Court 50 times.

In order to account for potential selection effects in the merits stage, as well as examine interesting relationships at the certiorari stage, the model used in this analysis is a Heckman probit model. The first stage is a model of the Court's decision to hear a challenge of an important statute in a given year. The second stage is a model of the Court's decision to invalidate, in part or in whole, the statute on constitutional grounds. This model allows us to control for potential sample selection bias at the merits stage, though it does not allow for us to disentangle what social processes are governing whether a statute is granted a constitutional challenge.¹² It also allows for a robustness check of findings at the decision stage: if the Court is more likely to invalidate laws in a majoritarian manner in certain political circumstances, it should also be more likely to hear challenges to those laws in the same set of circumstances. In order to both help with model convergence and control for duration dependence, I include cubic polynomials of years without a challenge in the first stage.

In order to test my hypotheses, I construct four measures that capture the circumstances in which elected officials might desire majoritarian judicial review. Elected officials do not always take positions on cases before the Court, such as explicitly advocating for federal statutes to be upheld or invalidated using judicial review. Even when they do, such positions might be a result of position-taking rather than a reflection of sincere policy preferences (Fox and Stephenson 2011). Instead of directly measuring whether elected officials announce their desire for the Court to strike

¹² The certiorari process is influenced by a number of actors, including litigants, lower court judges, political elites, and the justices themselves.

a statute, I instead measure circumstances in which one would expect elected officials to desire majoritarian judicial review. If the Court does engage in majoritarian judicial review, it should be more likely to strike laws in these circumstances when it shares policy preferences with another branch of government. The four measures I construct reflect the four mechanisms of majoritarian judicial review described earlier in the paper.

Rogers' (2001) model of informative judicial review posits that a legislature will defer to an ideologically similar court when an issue is of sufficient complexity. To code complexity, I adapt Vanberg's (2001) complexity measure to this analysis. It is a binary measure with any statute whose subject matter dealt with economic regulation, state-mandated social insurance, civil servant compensation, taxation, federal budget issues, or campaign finance is coded as hard and given a 0. All others are coded as easy and given a 1. While Vanberg originally meant for the measure to represent an issue that may have less political transparency, he agrees that these issues "tend to involve technical regulatory questions." These questions are the ones that policymakers may not understand the full impact a statute has when passing it, precisely the types of issues Rogers describes in his theory.

Graber (1993) argues that politically divisive issues should be ones that the president and Congress defer to Court to resolve the issue. This theory can be tested simultaneously with a measure of the divisiveness of a party on an issue. This is calculated using the votes in the House of Representatives on the statute under review. First I calculated the proportion of individuals in a party who voted for the particular

statute.¹³ For legislative-focused majoritarian judicial review, this is the majority party in the House; for executive-focused judicial review, it is the president's party. For all voice votes, the value is coded as 1. In order to remove the distinction between unanimous support and unanimous opposition to a bill, I folded this measure. To do this, I subtracted 0.5 from this measure, so that the range was -0.5 to 0.5, and then took the absolute value of the result. Finally, I multiply the resulting number by 2 and subtract this value from 1. The new range of the measure is from 0 to 1, where a value of 1 indicates a perfect split in the party's vote on a statute and a value of 0 unanimity.¹⁴

$$\text{Equation 1: } \textit{Fractiousness} = 1 - 2 * \left| \frac{\textit{PartyYeas}}{\textit{PartyVotes}} - 0.5 \right|$$

Whittington (2007) also argues that when entrenched interests in the status quo prevent the passage of new legislation, elected officials may look to the Court to strike less desirable laws. The American system is notably marked by separation of powers, but there is variation in whether those powers are unified under a single political party. To account for a governing party's inability to pass a law, I include a dummy measure of in which a 1 indicates the partisan composition of the U.S. Congress and the president is divided and a 0 indicates unified.

Fox and Stephenson (2011) argue that majoritarian judicial review creates a moral hazard, where politicians pass constitutionally questionable laws to pander to the public with the expectation that the Court will strike the law down if necessary. There is

¹³ Data was gathered from Mayhew's (2005) original data files and updates for his book and supplemented with information from the Congressional Quarterly Almanac.

¹⁴ Again, I calculate this for both the president's party and the majority party to accommodate for differences in opinion regarding whose preferences should matter.

not a currently defined measure of the constitutional soundness of a statute, at least one that can be scaled up quickly. The real world examples used for this theoretical story, however, always feature bills passed by a unanimous or near-unanimous legislature. Thus, I operationalize statutes as pandering to the public as a dummy variable, where a 1 indicates that a statute had 90% or greater support in both houses of Congress and signed by the president and 0 otherwise.

I also must construct a measure of the ideological similarity between the U.S. Supreme Court and elected officials. To do so, I employ Bailey's (2013) ideal point estimates and construct a measure of the absolute distance between the median justice on the Supreme Court's ideal point and the ideal point of the respective branch of government. This construction reflects the choice that elected officials have to make between direct policy action and relying on the Court to influence policy. For the executive branch, I simply use the president's ideal point. For the legislative branch, I use the average of the House median and the Senate median to reflect the institution's bicameral nature. In the replication materials, I also divide Congress into the House median and Senate median and rerun the analysis. The results are largely the same but are not shown because they are more complex than the ones contained here.

There is some debate about which elected officials' ideal points I should use: the officials in office at the time of a statute's passage or the officials in office at the time of the Court's decision. This decision is made on a case-by-case basis depending on the exact majoritarian mechanism tested. Uncertain policy environments make it difficult to forecast the future impact of legislation. For this mechanism, then, I use elected officials

at the time of passage. Similarly, the moral hazard to pass unconstitutional legislation in order to pander to voters is necessarily a conflict for those creating such legislation; I also use elected officials at the time of passage for this mechanism.¹⁵ In contrast, divided government makes it difficult to fight entrenched interests on existing legislation. For this mechanism, I use elected officials at the time of the Court's decision. Finally, divisiveness within a party can reasonably affect both elected officials attempts at passing new legislation and repealing existing ones; both sets of ideal points seem plausible. I present the results for current elected officials in this manuscript while also mentioning the results for elected officials at the time of legislature passage, which can be found in the supplementary materials.

To test my hypotheses, I estimate four models using the four different mechanisms of majoritarian judicial review and jointly examining the effect of presidential and congressional preferences. More specifically, I create a multiplicative interaction of one of the majoritarian mechanisms and both the ideological distance between the Court and the president and the ideological distance between the Court and Congress. If the hypotheses are correct, we should expect a few outcomes. First, the constitutive term of the majoritarian mechanism should be positive and statistically significant. As a multiplicative interaction, this constitutive term can be roughly interpreted as the effect that these majoritarian mechanisms have when the Court and

¹⁵ When using the ideal points of the enacting officials in a model, I exclude those statutes subject to a presidential veto and subsequent override. Such cases cannot be examples of majoritarian judicial review, as the president is taking direct action rather than relying on the Court to achieve a policy outcome.

elected officials have identical policy preferences (or the distance between them is zero) (Brambor, Clark, and Golder 2006). A positive effect reflects the first part of both hypotheses. Second, the constitutive term of the distance between the Court and elected officials should be positive and statistically significant. This term can be interpreted as the effect of ideological distance when there is no reason for the Court to strike down a law for elected officials. Finally, the interaction terms should be negative and statistically significant. As the ideological distance grows between the Court and elected officials, the effect of these majoritarian mechanisms should decline until it is statistically indistinguishable from zero.

In addition to my variables of interest, I also control for competing explanations of judicial review with a number of control variables. To control for the attitudinal model of U.S. Supreme Court decision-making (Segal and Spaeth 2002), I use a combination of Bailey's (2013) ideal point estimates of justices' ideology and the direction of the decision classification from the Supreme Court Database. If striking a statute was consistent with the median member of the court's ideological predisposition, then the observation is assigned the absolute value of the median member's ideal point. If not, then the observation is assigned the negative of the absolute value of the median member's ideal point. All cases where the ideological implications of a decision were unclear were coded as zero. This results in a measure of the court's attitudes towards the case where positive values indicate the court is ideologically inclined to striking and negative values indicate the court is ideologically opposed to striking.

The complexity of an issue area is also correlated with the salience of the issue area; less complex issues tend to be more salient ones (Vanberg 2001). This creates a complication in our models, as a particularly salient case is likely to result in the Court being protected from court-curbing and thus more likely to strike down a statute as unconstitutional. In order to control for the effect of salience, I include a measure of case salience created by Epstein and Segal's (2000) measure of case salience. It is a binary measure where a 1 indicates that the decision was reported on the front page of the New York Times and 0 otherwise; a 1 is an indicator of case saliency.

3.7. Analysis

The results of my analysis are contained in Table 1. I begin by focusing on legislative-focused judicial review. As one can see, the variables of interest are only sometimes correctly signed and almost never statistically significant in either stage of the model. At the invalidation stage, the only exception is in the model of pandering where the constitutive term on ideological distance is positive and statistically significant. Increasing ideological distance between the Court and Congress on more contentious statutes results in an increased probability of the Court striking down the statute. At the certiorari stage, the exception is divided government where the interaction term is statistically significant. Increasing ideological distance between the Court and Congress during times of divided government results in a decreased probability of the Court granting certiorari to a constitutional challenge. This absence of results is largely true at the challenge stage of the model.

Table 3-1: Heckman Probit Model of Legislative-Focused and Executive-Focused Majoritarian Judicial Review

Stage 2: Invalidations of important federal statutes	Complexity	Statute Divisiveness	Divided Government	Pandering
Majoritarian Mechanism - Congress ⁺	0.80 (0.81)	0.18 (0.61)	-0.22 (0.71)	-2.39 (0.75)
Distance to Congress	-0.29 (0.91)	0.48 (0.70)	0.69 (0.62)	0.54* (0.32)
Majoritarian Mechanism* Distance to Congress	1.59 (1.10)	-0.60 (1.28)	-0.06 (0.80)	3.09 (1.28)
Majoritarian Mechanism - President	-	1.11 (1.20)	-	-
Distance to President	1.40** (0.55)	0.98 (0.63)	-0.07 (0.48)	0.02 (0.27)
Majoritarian Mechanism* Distance to President	-0.99 (0.65)	-2.02 (1.52)	0.85 (0.75)	2.21 (0.67)
Court Ideology	0.08 (0.30)	0.43* (0.24)	0.51* (0.22)	0.49* (0.22)
Salience	0.71** (0.23)	-	-	-
Constant	-0.47 (1.13)	0.38 (0.99)	0.71 (0.78)	1.06 (0.72)
Stage 1: Challenges to important federal statutes				
Majoritarian Mechanism - Congress ⁺	0.32 (0.24)	0.21 (0.21)	-0.07 (0.23)	0.23 (0.25)
Distance to Congress	-0.32 (0.19)	-0.42 (0.21)	-0.16 (0.20)	-0.27 (0.25)
Majoritarian Mechanism* Distance to Congress	0.02 (0.37)	0.15 (0.41)	-0.35* (0.28)	-0.27 (0.33)
Majoritarian Mechanism - President	-	0.84** (0.30)	-	-
Distance to President	0.02 (0.15)	0.32** (0.13)	-0.14 (0.18)	-0.03 (0.09)
Majoritarian Mechanism* Distance to President	-0.25 (0.18)	-0.94** (0.27)	0.35 (0.22)	-0.40 (0.26)
Years without challenge	-0.05* (0.02)	-0.05** (0.02)	-0.05** (0.02)	-0.05* (0.02)
Years without challenge ²	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
Years without challenge ³	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
Constant	-1.73** (0.18)	-1.93** (0.16)	-1.61** (0.22)	-1.60 (0.14)

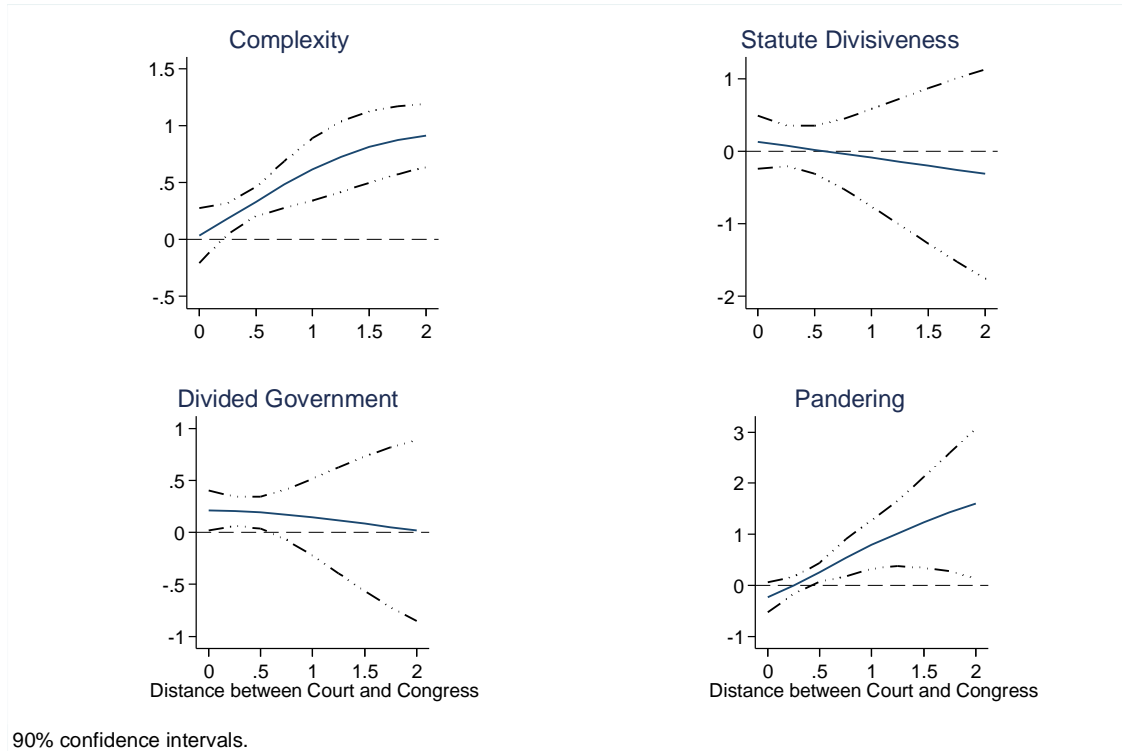
Model Features	Complexity	Statute Divisiveness	Divided Government	Pandering
LR Test of Independent Equations	3.73	3.63	3.74	3.31
N Stage 1	10680	10998	10998	10680
N Stage 2	128	141	141	128

*p<.05, **p<.01, one-tailed tests where applicable
+ In most models, the majoritarian mechanism for both branches will be the same variable.
Standard errors clustered by statute

To aid in the interpretation of the multiplicative interactions, I calculate the average marginal effect in the sample of each majoritarian mechanism in the invalidation stage across the empirical range of the ideological distance between the Court and elected officials. The legislative-focused results are in Figure 2. In order to be consistent with legislative-focused majoritarian judicial review, the marginal effect should be positive and statistically significant when the ideological distance between the Court and Congress is at zero and decline as the distance grows. This pattern is largely absent from the figure.

The sole exception, however, is for divided government. When Congress and the Court have identical preferences, a transition to divided government increases the probability the Court will strike a statute by 20%. This effect quickly declines and becomes statistically indistinguishable from zero. Combined with the results from the certiorari stage, this provides some evidence that the Court exercises majoritarian judicial review on behalf of Congress. For the other mechanisms, however, I fail to find evidence supporting legislative-focused judicial review.

Figure 3-2: Average Marginal Effect of Mechanisms of Majoritarian Judicial Review on the Probability of the Court Invalidating a Statute by the Ideological Distance between the Court and Congress.



Turning now to executive-focused judicial review, there are statistically significant results in the first two models. In the complexity model, the ideological distance constitutive term is positive in both stages and statistically significant in the second stage; the Court is more likely to hear a strike a noncomplex statute relative to a complex one when the Court and the president have diverging preferences. Additionally, the interaction term is negative in both stages, though just missing statistical significance. This indicates that as the ideological distance grows between the Court and the president, the Court becomes less likely to grant a challenge to and subsequently

strike complex laws. These results provide tepid support for the executive-focused majoritarian judicial review hypothesis.

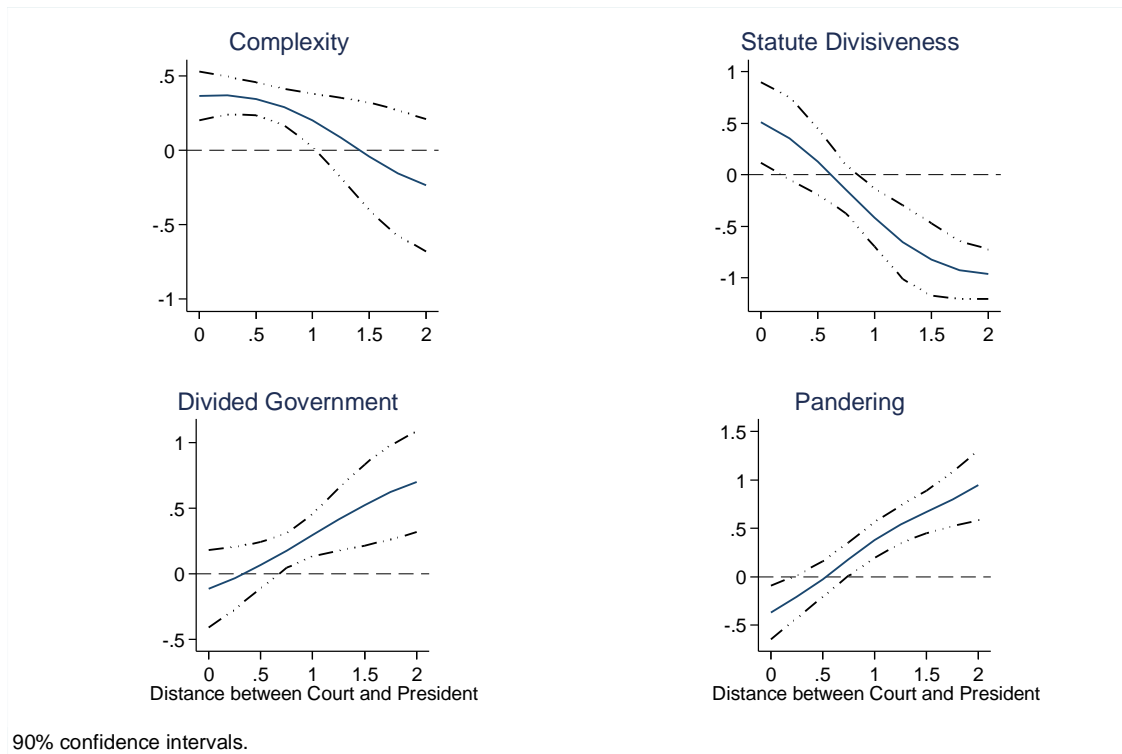
The statute divisiveness model has stronger results. In each stage, the divisiveness constitutive terms are positive and the interaction term is negative. In the challenge stage, these terms are statistically significant at the 0.01 level. In the invalidation stage, the interaction term narrowly misses statistical significance and the ideological distance constitutive term is statistically significant. These results increase the cumulative support for executive-focused judicial review.

The other two models do not show support for theory. The coefficients are occasionally correctly signed, but are never statistically significant when correctly signed. Perhaps there are additional considerations for the effect of divided government and pandering on executive-focused judicial review that are not be accounted for with these models. Future research will have to go into these possibilities.

The average marginal effects in the sample of each majoritarian mechanism across the empirical range of the ideological distance between the president and the Court are contained in Figure 3. Here we see strong evidence for the complexity and statute divisiveness models. When the Court and the president have identical ideology, the Court is 40% more likely to invalidate a complex statute than a noncomplex one. Similarly, the Court is 50% more likely to invalidate a statute that perfectly splits the president's party relative to one that has unanimous support. In both models, this marginal effect declines until it is statistically insignificant and, in the case of divisiveness, a significant negative effect. Again, we do not see support in the divided

government and pandering models but instead strong support in the opposite direction. I find support for executive-focused judicial review in two of the models.

Figure 3-3: Average Marginal Effect of Mechanisms of Majoritarian Judicial Review on the Probability of the Court Invalidating a Statute by the Ideological Distance between the Court and the president.



Beyond the variables of interest, the models controls perform largely as expected. The coefficients of the Court's and the public's ideological disposition in the case are mostly positive and statistically significant. As the Court (or the public) become more ideologically inclined to strike a law, the probability that the Court strikes a law under review increases. Additionally, the cubic polynomials are jointly statistically significant and the first term is independently statistically significant in all of the models. After a

law is passed or previously challenged, a subsequent challenge is most likely in years immediately afterward and quickly declines to zero.

Prior to concluding, I note here the results concerning sample selection bias. None of the models have a Wald test of independent equations that is statistically significant at conventional levels. All of the tests, however, are all significant at the 0.1 level with an average p-value under 0.06. I am not willing to discard such consistent evidence on the basis of a single percentage point. This constitutes strong evidence of sample selection bias, a phenomena scholars have long feared to be the case but never directly reported (Harvey and Friedman 2006, 2009, Hall and Ura 2015). These results provide a warning against studies of judicial decision-making that do not take into account decision-making at the certiorari stage as well as the merits stage.

3.8. Discussion

This study examines majoritarian judicial review in presidential systems, comparing and contrasting the incentives constitutional courts have to exercise judicial review to advance the policy goals of legislatures and presidents. I then test distinct predictions about majoritarian judicial review by analyzing U.S. Supreme Court decisions during the post-War period. I find evidence for both executive-focused and legislative-focused judicial review, though the stronger evidence is certainly for the presidency. The Court invalidates laws for the president in complex policy areas, where the Court might have greater expertise, and on issues divisive in the president's party, where the president taking a stance could unravel the president's legislative coalition.

The Court also invalidates laws for Congress during times of divided government, when pursuing legislative change might be impossible.

This study is not without limitations. There is concern about the generalizability of the findings. The research design focuses on statutes that are regarded as salient at the time of passage. Many are also considered landmark statutes in retrospective review. But the focus on important statutes excludes statutes with low political salience. In these cases, it is entirely possible that the results would differ. Whittington (2007) argues that elected officials are more likely to support majoritarian judicial review in cases with low political salience. If true, then we would expect to find stronger evidence of majoritarian judicial review in statutes with low political salience. Conversely, the results presented here represent a conservative test of majoritarian judicial review, making the evidence all the more compelling.

Additionally, the analysis focuses exclusively on U.S. Supreme Court data. While this is done because existing research on majoritarian judicial review focuses on the Court, these theories may well describe judicial decision-making on subnational and international courts. Additionally, this paper suggests that majoritarian judicial review functions differently in presidential and parliamentary systems. Future research should investigate these theories function in other political contexts.

3.9. References

- Bailey, Michael A. 2007. "Comparable Preference Estimates across Time and Institutions for the Court, Congress, and Presidency." *American Journal of Political Science* 51 (3): 433-448.
- Bailey, Michael A. 2013. "Is Today's Court the Most Conservative in Sixty Years? Challenges and Opportunities in Measuring Judicial Preferences." *Journal of Politics* 75 (3): 821-834.
- Bickel, Alexander M. 1986. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. New Haven: Yale University Press.
- Black, Ryan C., and Ryan J. Owens. 2012. *The Solicitor General and the United States Supreme Court: Executive Branch Influence and Judicial Decisions*. Cambridge: Cambridge University Press.
- Brambor, Thomas, William R. Clark, and Matt Golder. 2006. "Understanding interaction models: Improving empirical analyses." *Political Analysis* 14(1): 63-82.
- Burgess, Christine E. 1994. "When May a President Refuse to Enforce the Law?" *Texas Law Review* 72(3): 631-668.
- Bryan, Amanda C., and Christopher D. Kromphardt. 2016. "Public opinion, public support, and counter-attitudinal voting on the US Supreme Court." *Justice System Journal* 37 (4): 298-317.
- Casillas, Christopher J., Peter K. Enns, and Patrick C. Wohlfarth. 2011. "How public opinion constrains the U.S. Supreme Court." *American Journal of Political Science* 55 (1): 74-88.

- Clark, Tom S. 2009. "The Separation of Powers, Court-curbing and Judicial Legitimacy." *American Political Science Review* 54: 971-989.
- Clark, Tom S. 2011. *The Limits of Judicial Independence*. Cambridge University Press.
- Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6 (2):279–295.
- Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: Congressional Quarterly Press.
- Epstein, Lee, Andrew D. Martin, A. D., Jeffrey A. Segal, and Chad Westerland. 2007. The Judicial Common Space. *The Journal of Law, Economics, and Organization* 23(2), 303-325.
- Epstein, Lee and Eric A. Posner. 2016. "Supreme Court Justices' Loyalty to the President." *The Journal of Legal Studies* 45(2): 401-436.
- Epstein, Lee and Jeffrey A. Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science* 44 (1): 66-83.
- Fox, Justin and Matthew C. Stephenson. 2011. "Judicial Review as a Response to Political Posturing." *American Political Science Review* 105(2):397–414.
- Gibson, James L. and Gregory A. Caldeira. 2009. *Citizens, courts, and confirmations: Positivity theory and the judgments of the American people* Princeton: Princeton University Press.
- Gibson, James L., Gregory A. Caldeira, and Lester K. Spence. 2003. "Measuring Attitudes toward the United States Supreme Court" *American Journal of Political Science* 47 (2): 354-367.

- Gitell, Seth. 2003. "Making Sense of McCain-Feingold and Campaign-Finance Reform." *The Atlantic*, July/August.
- Gooding, Richard. 2004. "The Trashing of John McCain." *Vanity Fair*, November.
- Graber, Mark A. 1993. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary." *Studies in American Political Development* 7:35–73.
- Hall, Matthew E. K. 2014. "The Semiconstrained Court: Public Opinion, the Separation of Powers, and the US Supreme Court's Fear of Nonimplementation." *American Journal of Political Science* 58(2): 352-366.
- Hall, Matthew E. K., and Joseph D. Ura. 2015. "Judicial Majoritarianism." *The Journal of Politics* 77 (3): 818-832.
- Harvey, Anna. 2013. *A Mere Machine: The Supreme Court, Congress, and American Democracy*. New Haven, CT: Yale University Press.
- Harvey, Anna, and Barry Friedman. 2006. "Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000." *Legislative Studies Quarterly* 31:533–562.
- Harvey, Anna, and Barry Friedman. 2009. "Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court's Agenda." *The Journal of Politics* 71: 574–592.
- Johnsen, Dawn E. 2000. "Presidential Non-Enforcement of Constitutionally Objectionable Statutes." *Law & Contemporary Problems* 63 (1&2): 7-60.

- Lindquist, Stefanie and Pamela Corley. 2012. "National policy preferences and judicial review of state statutes at the United States Supreme Court." *Publius: The Journal of Federalism* 43 (2): 151-178.
- Martin, Andrew D. and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis* 10 (2): 134-153.
- Mayhew, David R. 1974. *Congress: The Electoral Connection*. New Haven, CT: Yale University Press.
- Mayhew, David R. 2005. *Divided We Govern: Party Control, Lawmaking and Investigations, 1946-2002*. 2nd ed. New Haven, CT: Yale University Press.
- McGuire, Kevin T., and James A. Stimson. 2004. "The least dangerous branch revisited: New evidence on Supreme Court responsiveness to public preferences." *Journal of Politics* 66 (4): 1018-1035.
- McMahon, Kevin J. 2004. *Reconsidering Roosevelt on race: how the presidency paved the road to Brown*. Chicago: University of Chicago Press.
- Prakash, Saikrishna Bangalore. 2008. "The Executive's Duty to Disregard Unconstitutional Laws." *Georgetown Law Journal* 96 (5): 1613-1684.
- Rogers, James R. 2001. "Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction." *American Journal of Political Science* 45: 84-99.
- Rosenberg, Gerald N. 1992. "Judicial Independence and the Reality of Political Power." *The Review of Politics* 54 (3): 369-398.

- Salzberger, Eli M. 1993. "A positive analysis of the doctrine of separation of powers, or: Why do we have an independent judiciary?" *International Review of Law and Economics* 13 (4): 349-379.
- Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
- Stephenson, Matthew C. 2003. "'When the Devil Turns ... ': The Political Foundations of Independent Judicial Review." *The Journal of Legal Studies* 32 (1): 59-89.
- Stimson, James A. 1999. *Public Opinion in America: Moods, Cycles, and Swings*. Boulder: Westview Press.
- Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45: 346-361.
- Whittington, Keith E. 2005. "'Interpose Your Friendly Hand': Political Supports for the Exercise of Judicial Review by the United States Supreme Court." *American Political Science Review* 99: 583-96.
- Whittington, Keith E. 2007. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*. Princeton: Princeton University Press.

4. SEVERABILITY DOCTRINE AND THE EXERCISE OF JUDICIAL REVIEW

4.1. Introduction

The most important principle for constitutional courts exercising judicial review is deference to the legislature. While constitutional courts are vested with the authority to invalidate statutes by declaring them unconstitutional, they are not vested with the authority to create law. Thus judges should be careful not to let the desirability of a law from a policy perspective contaminate the legitimacy of a law from a constitutional perspective (Bickel 1962). Such a view has been around since the emergence of modern democracy; Thomas Jefferson once expressed that “one single object [earns] the endless gratitude of society; that of restraining judges from usurping legislation. And with no body of men is this restraint more wanting than with the judges of what is commonly called our general government”. In the American context, this principle has manifested itself in the U.S. Supreme Court’s reluctance to strike down federal laws when given the opportunity (Dahl 1957, Bailey and Maltzman 2011).

Yet there are times when even the most principled judge must strike a law as unconstitutional. In these instances, judicial restraint is still at the forefront of judicial decisionmaking. Perhaps the most prominent example of this is decisions regarding severability. If an unconstitutional statutory provision of a statute is severable, a court may “sever” that provision from the statute so that the remainder still carries the full force of law. Judges sever unconstitutional provisions as a means of deferring to the legislature by preserving as much of the original statute as possible. If a statutory

provision is inseverable, however, the court will strike down not only the unconstitutional provision but also interrelated, otherwise constitutional provisions of that same statute.

Severability can be highly salient in Court decisions and, as a result, highly influential in policy outcomes. The constitutionality of the Affordable Care Act, the landmark piece of healthcare legislation from the Obama administration, was challenged in *National Federation of Independent Business v. Sebelius* (2012). The most pressing question of the case was whether the statute's individual mandate, which required virtually all persons in the U.S. to purchase health insurance, was under Congress' authority in Article I of the Constitution. Almost equally important was whether other provisions of the law would be invalidated as inseverable if the mandate were found unconstitutional. All parties of the case filed separate briefs on the issue of severability, and several amicus briefs on the matter were also filed. The Court eventually found the individual mandate to be constitutional exercise of taxing powers. New litigation on the mandate triggered by reforms during the Trump administration, however, once again highlight severability concerns; a judge from the U.S. District Court for the Northern District of Texas recently ruled the entirety of the statute unconstitutional because it was inseverable from the mandate (*Texas et. al. v. U.S. et al. 2018*).

Severability doctrine is widely discussed within legal scholarship. There is large debate, however, about whether constitutional courts, and more specifically the U.S. Supreme Court, consistently approach the doctrine of severability. At best, inconsistent application of severability doctrine would be an unforced error on an institution known

for principled decisionmaking. At worst, severability may function as a mask for judicial activism driven by ideological motives. But while there is strong concern about the Court's application of severability doctrine, there has yet to be positive analysis on the subject; this makes it ripe for study by empirically-oriented scholars.

This paper analyzes the systematic determinants of severability decisions in constitutional law. I begin by examining the history and legal scholarship on severability doctrine. I next develop a series of hypotheses about the determinants of severability grounded in both positive and legal theory. I then test these hypotheses on U.S. Supreme Court constitutional decisions on important federal statutes from 1949-2011. The analysis reveals that while ideological considerations do drive the use of severability doctrine, the Court shows deference to currently serving elected officials as well.

4.2. The Jurisprudence of Severability

Once the U.S. Supreme Court has decided that a government action is unconstitutional, it must make a series of decisions in order to properly remedy the unconstitutional action. In general, the Court will rule as narrowly as possible as a means of deference to avoid needlessly frustrating legislative will. They can do this using one of two means (Sherwin 2000). First, the Court might decide that a statute is only unconstitutional as applied to a particular case (Lindquist and Corley 2011). If it does so, the statute still carries the full force of law except for the specific circumstances that led to the litigation. For example, Title III of the Voting Rights Act Amendments of 1970 set the voting age in national, state, and local elections to 18, an act which contradicted many age requirements set by state law. In *Oregon v. Mitchell* (1970), the Supreme

Court ruled that while Congress had the authority to set requirements for national elections, it could not set voting age requirements for state and local elections. Thus the Court ruled that Title III was unconstitutional as applied to state and local elections, but allowed the law to continue to be applied to national elections.

Sometimes, however, certain portions of statutes have no constitutional applications; these are called facially unconstitutional. In the event of facially unconstitutional statutory provision, the Court can use its second means of deferring to Congress by ruling that the provision is severable (Metzger 2004). If the offending section is severable, also at times referred to as separable, then the unconstitutional portion no longer carries the full force of the law while the rest of the statute does. In *Marbury v. Madison*, the Court ruled that Congress could not change the Court's jurisdiction through ordinary legislation. They ruled that Section 13 of the Judiciary Act of 1802 was unconstitutional, but severable; the remaining parts could still function as law. Indeed, the dominant paradigm for the first century of judicial review was that any provision of a facially unconstitutional law were severable (Nagle 1993). As a parallel in modern times, the majority in *National Federation* ruled that while the Affordable Care Act's expansion of Medicaid was unconstitutional, as it violated the principle of federalism by attempting to coerce action by the states, this provision was severable from the rest of the statute and could function independently as law.

If an offending section is facially invalid but not severable from other provisions of the statute, up to and including the entirety of the statute, then all of those provisions are ruled unconstitutional; this includes those parts of the law that, in absence of the

offending section, would otherwise be constitutional. The first instance of inseverability was *Warren v. Mayor & Aldermen of Charlestown*, when the Supreme Judicial Court of Massachusetts invalidated a statute authorizing the annexation of Charlestown to Boston. When the Supreme Judicial Court determined that the annexation was unconstitutional, all subsequent provisions of the law detailing the implications of the annexation were also ruled unconstitutional.

Why might a court choose to strike the entirety of a statute due to a single section being unconstitutional? Surprisingly, striking a law as inseverable is also justified from a perspective of judicial deference. If a legislature would pass a statute even without a constitutionally problematic provision, the Court should rule it as severable. If not, however, the Court should rule it as inseverable. Chief Justice Shaw, who issued the *Warren* decision, explained his decision from a viewpoint of judicial deference:

“that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.”

This deference to legislative intent was subsequently adopted by the U.S. Supreme Court when it first confronted issues of severability in *Champlin Refining*

Company v. Corporation Commission of Oklahoma (1932); the Court generally assumes severability “[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not”. This approach has changed little in subsequent Supreme Court jurisprudence. In *United States v. Booker*, the Court invalidated a provision of Sentencing Reform Act that created an appellate review process for mandatory prison sentences because it ruled that those sentences themselves were unconstitutional.

4.3. Critical Views of Severability Doctrine

While grounded in the basis of judicial deference, the Court’s approach to severability is controversial amongst legal academics. From a normative angle, some scholars do not accept severability as judicial deference to the legislature. Noah (1999) views severance as a form of judicial policymaking, comparing the severing of a statute to the line-item veto that the Court ruled as an unconstitutional encroachment of legislative authority in *Clinton v. City of New York* (1998). The only consistent way for the Court to approach unconstitutional legislation is to presume inseverability in legislation unless explicitly stated; as will be discussed below, such an approach is not currently used.

Empirically, scholars have questioned whether the Court consistently applies severability doctrine. Some scholars have criticized the application of severability in different areas of law. Stern (1937) noted that the Court might presume severability more often for state laws and national criminal laws. Jona (2008) argues that inseverability might be more common in First Amendment and Equal Protection cases.

Such an approach is certainly possible, given the increasing evidence that legal considerations play a large role in some, but not all, cases before the U.S. Supreme Court (Bailey and Maltzman 2011). But the most common view is that there does not appear any systematic application of severability doctrine (Stern 1937, Nagle 1993, Movsesian 1995, Metzger 2004, Gans 2008). Indeed, many of these scholars suggest that severability is just a means by which the justices might pursue other ends, whether jurisprudential, ideological, or otherwise. This viewpoint is consistent with the attitudinal model, which posits that ideological considerations alone drive U.S. Supreme Court decision-making (Spaeth and Segal 2002).

The specter that severability doctrine might not be systematically used by the Court should be of great interest to both legal scholars and political scientists. That severability doctrine might further be driven by simple ideological considerations would also be of great interest. But rather than simply testing predictions from legal scholarship, it is worth applying positive models of political institutions to see if they can give a systematic explanation to the Court's use of severability doctrine. I now turn to the legislative and judicial politics literatures to derive relevant testable hypotheses.

4.4. Severability Doctrine and Severability Clauses

Within the separation of powers, judicial review is the strongest tool the U.S. Supreme Court has to influence public policy. Such a strong power naturally draws the attention of the U.S. Congress, who does not want judicial review exercised arbitrarily. Indeed, Congress has many tools at its disposal to respond to Court decisions and coordinately construct the Constitution, including both blunting the effect of decisions

via statute (Ignagni and Meernik 1994, Meernik and Ignagni 1997) and punishing the Court for making an unpopular decision (Whittington 2007, Ura and Wohlfath 2010, Harvey 2013). Beyond changing the status quo, there is plenty of evidence that shows that the threat of such tools influences judicial decision-making (Clark 2009, McGuire 2004).

But Congress does not only rely on ex post retaliation when confronted with the possibility of judicial review. Legislators can anticipate judicial review when crafting legislation, adding in provisions that guide the decision-making of the courts when reviewing the constitutionality of a statute. One of the most prominent provisions added to statutes are severability clauses (Nagle 1993). Utilized soon after American courts began employing severability doctrine, these clauses specifically state that certain or all provisions within a statute are severable from the rest of the statute. The Budget Control Act of 2011, for example, contained the following severability clause: “If any provision of this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act and the application of this Act to any other person or circumstance shall not be affected.”

Severability clauses are readily discussed in Supreme Court cases. In *National Federation*, the lack of a severability clause garnered significant debate in the briefs filed in the case. The petitioners, believing the individual mandate to be unconstitutional, argued that because the House version of the statute originally contained a severability clause but the clause was removed prior to passage, this should lead to the view that the provisions of the Affordable Care Act are inseparable and the entirety of the Act should

be invalidated. The Obama administration argued that the mandate was constitutional, but also conceded a limited amount of inseverability; if the mandate were ruled unconstitutional, it was inseverable from the provisions guaranteeing the issuance of insurance policies to individuals with preexisting medical conditions.

While the individual mandate was ruled to be a constitutional, all of the justices seemed to at least implicitly agree that the mandate was inseverable from the guaranteed issue provision. This became an important point when the legislation under the Trump administration removed all financial penalties to individuals failing to comply with the Affordable Care Act. This triggered a number of lawsuits, arguing that a mandate without a financial penalty no longer constituted a tax and, as a result, was unconstitutional. Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas agreed in *Texas et. al. v. U.S. et al.* (2018), and further argued that given the Court's decision in *National Federation* that the mandate was inseverable from the entirety of the law and thus was invalid. While the District Court ruling will likely not be the final say on the matter, the rule goes to show that such severability clauses can matter in judicial decisionmaking.

Legal scholars have criticized how the Court approaches severability clauses. The Court's current jurisprudence on these clauses, stated in *Alaska Airlines v. Brock* (1987), is "the inclusion of such a clause creates a presumption that Congress did not intend the validity of [the entirety of a statute] to depend on the validity of the constitutionally offensive provision." But just two decades earlier in *United States v. Jackson* (1968), the Court frankly stated that "the ultimate determination of severability

will rarely turn on the presence or absence of such a clause.” These statements infuriate many scholars, who see such statements as contravening legislative intent and entering into the realm of judicial policymaking (Nagle 1993, Gans 2008).

Scholars have further argued that even if the Court consistently approaches severability clauses, their impact is limited given how the Court approaches severability doctrine as a whole. When approaching matters of severability, the Court does not approach each statute with a blank slate. Instead, the Court generally presumes severability for a statute, even if those statutes do not have a severability clause (Metzger 2004, Gans 2008). This presumption reduces the power of severability clauses, which would also make the Court default to severability. Indeed, there is a significant scholarly claim that severability clauses have no effect on determinations of severability doctrine by the Court.

While severability clauses have garnered much scholarly attention in the legal community, they have not been widely studied by political scientists. The sole study I have found in political science looks at the effect of severability clauses on judicial decision-making in cases only involving statutory questions (Maltzman et al 2014). While certainly a useful contribution in its own right, it sidesteps the core questions about the impact of severability clauses on constitutional law. Thus, we now develop expectations about how severability clauses might affect constitutional law.

In order to develop predictions as to how severability clauses affect judicial decision-making, one must begin by questioning why Congress might adopt a severability clause in the first place. Implicit within the decision to include a severability

clause is the assumption that it will be relevant in a court case. But why would Members of Congress believe a law would come under review by a court? It is likely that these clauses are added to statutes that, at least from the perspective of some legislators, suffer from a somewhat rational objection to its constitutionality. But if this is true, then these statutes should be more likely to be the subject to a constitutional challenge in front of the Supreme Court at some point in time. This leads to a hypotheses:

Constitutional Challenge Hypothesis: a court should be more likely to hear a challenge to a statute that includes a severability clause.

Members of Congress would not be alone in recognizing constitutional deficiencies in legislation, however. Savvy attorneys could identify constitutional faults in legislation after it becomes law, which could inspire those opposed to such legislation to fund court challenges. The Supreme Court could also recognize these deficiencies and, wanting to fulfill its role as arbiter of constitutional matters, quickly decide to review the case. When these statutes come before the Court, it might not strike down every law. But the Court may be more likely to strike a law with a severability clause than without because of the underlying constitutional problems with statutes that led legislators to add a severability clause in the first place.

This is not to suggest that severability clauses serve as a signal of the unconstitutionality of legislation. It would be absurd to think that Congress has a relative advantage in identifying unconstitutional statutory provisions relative to the Supreme Court; it might even be incorrect to assume they have more information relative to motivated attorneys. Rather, Congress only includes these clauses when engaging in

constitutionally dubious policymaking and, as a result, the Court is more likely to quickly grant certiorari to a constitutional challenge of these statutes and subsequently rule them unconstitutional. This leads to a pair of hypotheses:

Challenge Immediacy Hypothesis: a court should be more likely to hear a challenge to a statute soon after its passage if that statute includes a severability clause.

Constitutional Invalidation Hypothesis: a court should be more likely to rule a statutory provision unconstitutional when that statute includes a severability clause.

Severability clauses may also influence judicial decision-making on the more technical legal matters when invalidating a statute. The clause instructs a court to sever some provisions of a statute from others if they are declared unconstitutional.

Ostensibly, the legislature would include these clauses if it believed two related propositions: 1) that the Court rules statutory provisions inseverable frequently enough to warrant a legislative response, and 2) that the Court is less likely to rule a statute inseverable if that statute has a severability clause than if it did not. The former proposition is almost trivial, as the opportunity cost of including a boilerplate severability clause is next to nothing. The latter is contestable, as evidenced by legal scholarship on the matter, but leads to a clear hypothesis:

Severability Clause Hypothesis: a court should be less likely to rule an unconstitutional provision of a statute inseverable from other provisions when that statute includes a severability clause.

4.5. Severability Doctrine as Statutory Decisionmaking

Severability doctrine only becomes relevant when the Court is engaged in constitutional decisionmaking. Yet at its core, severability is a statutory question rather than a constitutional one. If a statute has a severability clause, then the Court's choice is clear: Congress intended for unconstitutional provisions to be severed. In the absence of a clause, the Court must divine the intent of Congress using other means. Such a description clearly puts severability doctrine within the realm of statutory decisionmaking. As a result, positive models of statutory decisionmaking should be applicable to severability doctrine.

There is broad consensus that statutory and constitutional cases involve different approaches to judicial decisionmaking. Of the many differences, one notable difference is the importance of elected officials' preferences (Epstein and Knight 1997). In statutory decisionmaking, elected officials can respond to unfavorable decisions by passing new legislation. In order to make their decisions last, then, the Court must take into account the preferences of elected officials. In contrast, elected officials cannot respond to constitutional decisions via ordinary legislation. Instead, it can either pursue constitutional changes, which are much more difficult to enact, or court-curbing, a blunt, politically costly attempt to punish courts by changing their level of funding or amount of discretion (Clark 2009). This is not to say that constitutional courts generally, or the U.S. Supreme Court specifically, are completely immune to the influence of elected officials when engaging in constitutional decisionmaking (Vanberg 2001, Stephenson

2003, Clark 2009). Nevertheless, the Court is seen to be more sensitive to the preferences of elected officials when engaging in statutory decisionmaking.

Perhaps the canonical model of statutory decisionmaking that takes into account the preferences of elected officials is Marks' separation of powers model (2015).¹ Marks explained why Congress would tolerate a statutory Supreme Court decision inconsistent with its preferences. If the pivotal actors in the policy-making process, such as the median member of the House, the median member of the Senate, and the president, share the same interpretation of a particular statutory provision, then they will respond to an unfavorable statutory decision by passing a statute containing said interpretation. Looking down the game tree, the Court would anticipate this reaction and adopt this desirable interpretation so that it is not statutorily overruled. But if a single pivotal member has a different preferred interpretation of the statute, the Court is free to choose a statutory interpretation it prefers so long as it is not too extreme. There is considerable debate as to whether this model has empirical support; proponents of the attitudinal model in particular argue for a negligible relationship (Spiller and Gely 1992, Segal 1997, Segal and Spaeth 2002, Marshall, Curry, and Pacelle 2015).

The separation of powers models could predict judicial decisionmaking on severability doctrine in at least two ways. First, elected officials may have preferences over whether a statutory provision should be construed as severable or inseverable. In this instance, it would be straightforward to apply the separation of powers model to arrive at concrete predictions. But while this is a promising line of research in theory, in practice it is likely to not influence Court decisionmaking. Elected officials do not

always take positions on cases before the Court, such as explicitly advocating whether a statute is severable or inseverable. Even when they do, such positions might be the result of a moral hazard given that they do not have to make the judgement on severability (Fox and Stephenson 2011). Thus while theoretically possible, such a relationship is unlikely to be observed.

In a more promising vein, the separation of powers model may have a more general influence on severability doctrine. Deference to the legislature is one of the strongest principles used in severability. By ruling an unconstitutional provision inseverable, the Court may frustrate legislative attempts at policymaking. This is especially true if currently serving elected officials did not enact the statute under review; if even a single pivotal policymaker opposed the statute under review, it could prevent reenactment of otherwise constitutional provisions if they are ruled inseverable. If currently serving elected officials did enact the statute under review, however – or currently serving elected officials are uniformly supportive of the statute under review – then an inseverability ruling will not frustrate legislative policymaking because the otherwise constitutional provisions could simply be reenacted. This application of the separation of powers model also makes a clear prediction and, unlike the previous application, pivotal policymakers regularly take positions supporting statutes. This leads to a clear hypothesis:

Pivotal Support Hypothesis: a court should be more likely to rule an unconstitutional provision of a statute inseverable from other provisions when the statute is uniformly supported by pivotal policymakers.

4.6. Research Methods

In order to test the above hypotheses, I need to analyze a set of constitutional court decisions that also employ severability doctrine. The U.S. Supreme Court provides an excellent test case for two reasons. First, the literature on severability doctrine almost exclusively focus on the U.S. Supreme Court, making the Court an ideal place to test my hypotheses. Second, the Court is the subject of a wealth of research on the ideological preferences of its members over a long period of time, with a particular emphasis on the measures of justice ideal points (Segal and Cover 1989, Martin and Quinn 2002, Epstein, Martin, Segal, and Westerland 2007, Bailey and Maltzman 2011). This will allow us to test whether severability doctrine can be predicted by the ideological preferences of the judges who use it. Third, the U.S. Congress regularly includes severability clauses within its statutes. This variation allows for statistical analysis to be conducted on many of the hypotheses. For these reasons, I analyze a subset of U.S. Supreme Court decisions from 1949-2011.

Rather than solely focusing on U.S. Supreme Court decisions, however, this analysis draws on a statute-centered approach of previous studies (Hall and Ura 2015, Harvey and Friedman 2006, 2009). The study of judicial review inevitably leads to studying court decisions. Solely studying them in presence of a discretionary docket, however, can lead to a selection bias as strategic interactions may happen at the certiorari stage. This can negatively impact our ability to make inferences, meaning we must go beyond simply looking at decisions and look at the statutes which the decisions are about. Thus, the unit of observation in this analysis are federal statutes. Of course,

there are difficulties with looking at all federal statutes. Collection of the data would be a monumental task and would thus limit analysis to a small time period.

As a middle ground, I analyze a subset of statutes enacted between 1949 and 2011. The subset is whether a law is landmark legislation, as defined by Mayhew (2005). This results in an unbalanced time-series cross-sectional dataset of 368 statutes over the time period, with writs of certiorari granted to constitutional challenges 148 times and subsequent ruled unconstitutional 54 times. Of these rulings, 5 cases had otherwise constitutional provisions of a statute invalidated because they were inseverable from other unconstitutional provisions.

In order to account for potential selection effects, as well as examine interesting relationships at the certiorari stage, I employ a Heckman multinomial probit model. The first stage is a model of the Court's decision to hear a constitutional challenge to an important statute in a given year. The second stage is a model of the Court's decision whether to invalidate, in part or in whole, the statute on constitutional grounds. Because the Court has many different options when ruling on the constitutionality of a particular section of a statute – constitutional, unconstitutional but severable, unconstitutional and inseverable from other parts of the statute – the second stage must be a multinomial probit model with three possible outcomes. I estimate the model using the `cmp` package developed for Stata by Roodman (2011). The comparison group is a statute that is invalidated but ruled to be severable from the rest of the statute. Standard errors are clustered by statute.

One could argue that a more appropriate modelling strategy would be a multinomial probit with four outcomes: constitutional, unconstitutional as applied, facially unconstitutional and severable, and facially unconstitutional and inseverable from other parts of the statute. Such a model would take into account distinctions between facial and as applied invalidations (Lindquist and Corley 2011). I do not use this approach for both theoretical and methodological reasons. Theoretically, there is little distinction between as applied invalidations and facial invalidations that are severable; both are means of preserving the original statute in order to defer to the legislature (Sherwin 2000). In the context of this paper's questions, then, there is no reason to separate the two categories. Methodologically, a Heckman multinomial probit model with four alternatives would not converge during my estimation procedure.

There are two crucial independent variables in this analysis, which I now describe in turn. The first measure is a dummy variable if a statute contains a severability clause. This includes general severability clauses, like the one contained in the Balanced Budget Control Act of 2011. It also includes more specific severability clauses that may only pertain to specific sections within statutes. This variable is included in both stages of the analysis, as there are relevant hypotheses about severability clauses at both the certiorari stage and the decision stage. Of the 368 statutes in the sample, 102 have severability clauses.

The second variable represents Marks' separation of powers model. I adopt a measure in the literature that estimates whether the current pivotal policymakers support or oppose a given statute under review (Segal, Westerland, and Lindquist 2011, Hall and

Ura 2015). I collect the original roll call votes for each public law from VoteView (Lewis et al 2017). Using logit, I then regress these roll call votes on the Common Space Score of Members of Congress and the president (Poole 1998).¹⁶ Using the resulting model coefficients, I can then predict the probability that a future elected official supports a law using their Common Space Score. Note that for those laws passed unanimously or via voice votes in both chambers, there is no variation to run regression models. In these instances, the predicted support for all future officials is 1.

I then identify pivotal actors in the policymaking process, relying on the insights of Krehbiel (1998), and record the minimum level of predicted support to a statute from any of the pivotal actors. I test three different pivot models: the floor median model, the Senate filibuster model, and the party gatekeeping model. Each of these models are outlined in more detail in Hall and Ura (2015). The resulting measure gives the probability that the most hostile pivotal actor supports the law based on their ideology, as measured by Common Space scores. This variable is included in both stages of the analysis. While the Pivotal Support Hypothesis only makes predictions for the decision stage, Hall and Ura (2015) have shown how this variable also effects the certiorari stage.

At the certiorari stage, I also include cubic polynomials to control for duration dependence (Carter and Signorino 2010). Inclusion of these variables is helpful for multiple reasons, both theoretical and methodological. Theoretically, including these variables and interacting them with other substantive variables allows me to estimate a

¹⁶ One statute, public law number 107-40, was predicted perfectly. Coefficients could not be generated it is subsequently excluded from the analysis.

nonproportional hazards model. This will be useful for testing the Challenge Immediacy Hypothesis, which suggests that statutes with severability clauses will be more likely to be reviewed by the Court immediately after passage than those without these clauses. Methodologically, these polynomials serve as the necessary instrument to estimate the Heckman model.

At the second stage of the model, I control for the Court's ideological predispositions. As indicated earlier, many scholars believe that severability doctrine is merely a legal guise for their ideological preferences. To measure the court's ideological preferences, I use a combination of Bailey's (2013) ideal point estimates of justices' ideology and the direction of the decision classification from the Supreme Court Database. If striking a statute was consistent with the median member of the court's ideological predisposition, then the observation is assigned the absolute value of the median member's ideal point. If not, then the observation is assigned the negative of the absolute value of the median member's ideal point. All cases where the ideological implications of a decision were unclear were coded as zero. This results in a measure of the court's attitudes towards the case where positive values indicate the court is ideologically inclined to striking and negative values indicate the court is ideologically opposed to striking.

I also control for additional legal doctrines that may influence decisions to strike laws and, more specifically, to strike laws as severable or inseverable. The Court has been noted to approach decisions in certain areas of constitutional laws different than others. Overbreadth doctrine suggests that the Court is more likely to invalidate and find

inseverable laws when challenged on free speech grounds, while equal protection doctrine suggests the Court is more likely to invalidate and find inseverable federal laws when challenged on due process grounds (Jona 2008, Lindquist and Corley 2011). Therefore, I also control for whether a free speech or due process challenge was brought against the law under review in the second stages of my analysis.

4.7. Analysis

Table 1 contains the results of the probit models used to examine the Constitutional Challenge and Challenge Immediacy Hypotheses. The first model includes the presence of a severability clause and proportional hazards. The model strongly supports the Constitutional Challenge Hypothesis. Statutes with severability clauses are more likely to be challenged than statutes without severability clauses. The model also supports the use of cubic polynomials as a means of modelling duration dependence within the data. The coefficient of the untransformed is statistically significant, and a joint Wald test of their coefficients is as well. Finally, the model replicates prior work showing that as the support for a statute from all pivotal policymakers becomes uniformly positive, the Court is less likely to hear a constitutional challenge to a statute (Hall and Ura 2015).¹⁷

The second model includes nonproportional hazards from interacting the severability variable with the cubic polynomials. While these interaction terms are not statistically significant, they are also not the basis for a test of the Challenge Immediacy

¹⁷ Results for the Filibuster Gatekeeping Model and Party Median Model are in the replication materials. They are substantively similar, though the p-value of the pivotal policymaker coefficient changes.

Hypothesis. Rather, the Hypothesis suggests that there should be a difference only in those years immediately after the passage of the statute. Figure 1 presents the predicted probability that the Court will grant certiorari to a constitutional challenge of a statute by the presence of a severability clause and the number of years since its initial passage or previous challenge. Challenges to statutes with severability clauses are about twice as likely compared to those without severability clauses. This effect persists over time, but the gap between the two becomes smaller and smaller until at about 20 years post passage they are statistically indistinguishable from each other.¹⁸ Thus, we also find support for the Challenge Immediacy Hypothesis.

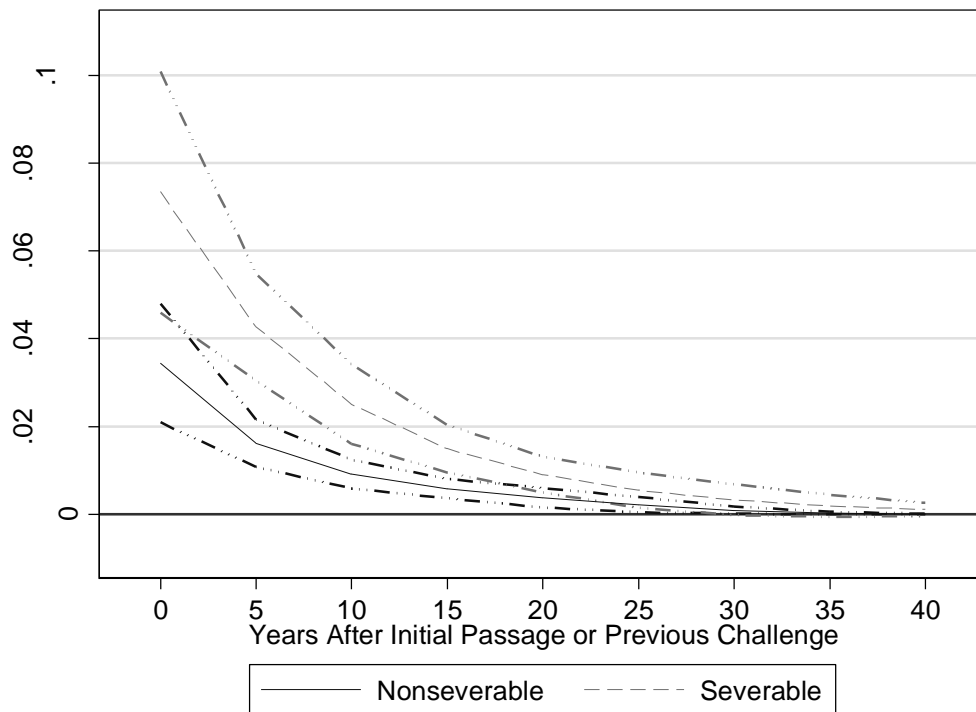
Table 4-1: Probit Model of Constitutional Challenges Granted to an Important Federal Statute by Year, 1949-2011.

	Model 1	Model 2
Severability Clause	0.39** (0.09)	0.37* (0.16)
Support of Pivotal Policymaker	-0.30* (0.15)	-0.30* (0.15)
Years Since Previous Challenge	-0.06** (0.02)	-0.08* (0.03)
Years Since Previous Challenge ²	0.00 (0.00)	0.00 (0.00)
Years Since Previous Challenge ³	-0.00 (0.00)	-0.00 (0.00)
Severability Clause*Years Since Previous Challenge	-	0.02 (0.05)
Severability Clause*Years Since Previous Challenge ²	-	-0.00 (0.00)
Severability Clause*Years Since Previous Challenge ³	-	0.00 (0.00)
Constant	-1.62** (0.16)	-1.60 (0.16)

¹⁸ This is shown in the replication materials.

	Model 1	Model 2
N	11628	11628
*p<0.05, **p<0.01, one-tailed tests used for hypothesized relationships		
Robust Standard Errors Clustered by Statute are in Parentheses		
Table shows Floor Median Model; additional models in the replication materials		

Figure 4-1: Predicted Probability of the Court Granting a Constitutional Challenge to a Statute by Years After Initial Passage and Presence of a Severability Clause



Turning now to the Constitutional Invalidation Hypothesis, Table 2 presents the results of the Heckman multinomial probit model.¹⁹ The first column contains the comparison between a statute being ruled as constitutional and being ruled as

¹⁹ To conserve space, only the second stages of the Heckman models will be shown. Results for the prior stages can be found in the replication materials.

unconstitutional and severable. The severability parameter is in the incorrect direction: statutes with severability clauses appear more likely to be found constitutional, not less. This result does not provide support for the Constitutional Invalidation Hypothesis. While the result is statistically significant using a two-tailed test, it does not conform to my expectation; therefore, I treat this statistically significant coefficient as a null result. The strong effect shown by the coefficient, however, indicates that future scholarship should further study what could be driving this result.

While our hypothesis of interest in this model is not supported, many of the control variables perform as expected. When the Court is ideologically predisposed to striking, it is less likely to rule a law as constitutional; this result is largely consistent with previous research (Segal and Spaeth 2002). The Court is also less likely to find a law constitutional when it is challenged on free speech grounds: a statute in the sample is 10% less likely to be found constitutional when challenged in this way. Interestingly, statutes challenged on due process grounds are more likely to be constitutional, not less. While this result goes against the current literature, it is hardly surprising. Due process challenges to statutes are often tacked on to other controversies in order to exhaust the possible litigation strategies. The justices undoubtedly know this and likewise view such challenges with suspicion, according to the results of the model: statutes challenged on due process grounds are 10% more likely to be found constitutional. Finally, the support of the pivotal policymaker has no influence on whether a law is constitutional or unconstitutional but severable; this comports well with previous research (Segal, Westerland, and Lindquist 2011).

Table 4-2: Heckman Multinomial Probit Model of Decision to Invalidate an Important Federal Statute, 1949-2011

	Constitutional	Unconstitutional and Inseverable
Severability Clause	0.86 (0.32)	-0.14 (0.20)
Support of Pivotal Policymaker	0.49 (0.64)	0.74* (0.39)
Court's Ideological Predisposition to Strike	-1.41** (0.47)	-0.58* (0.28)
Freedom of Speech Challenge	-1.02** (0.37)	-0.44* (0.22)
Due Process Challenge	0.56 (0.29)	-0.02 (0.16)
Constant	-1.59 (0.92)	0.22 (0.34)
N Stage 2		148
N Stage 1		11,628
*p<0.05, **p<0.01, one-tailed tests used for hypothesized relationships		
Comparison group is Unconstitutional and Severable		
Robust Standard Errors Clustered by Statute are in Parentheses		
Only Stage 2 Estimates are Shown to Conserve Space		
Table shows Floor Median Model; additional models in the replication materials		

The second column contains the comparison between a statute being ruled as unconstitutional and inseverable and being ruled as unconstitutional and severable. A look at the severability parameter reveals it is negative and statistically insignificant. While this result is in the correction, it fails to provide support for the Severability Clause Hypothesis. Despite the Court's current rhetoric concerning severability doctrine, it does not seem to respect the inclusion of a severability clause within a statute. Caution, however, must be used when interpreting this result: a null result is not necessarily indicative of a null relationship (Rainey 2014). Even still, the lack of support for the

expected relationship does cast further doubt on whether severability clauses affect judicial decisionmaking.

In contrast, the support of the pivotal policymaker is positive and statistically significant. As the predict level of support for the pivotal policymaker shifts from completely opposed to the statute to completely supportive of the statute, the probability that the Court rules a statutes as inseverable rather than severable increases by 28%. This provides support for the Pivotal Policymaker Hypothesis. This particular result shows the Floor Median model. Additional models, found in the replication materials, also show positive coefficients. Their p-values, however, differ with a maximum of 0.16.

The control variables also show interesting results. When the Court is ideologically predisposed to striking, it is less likely to rule a statute inseverable rather than severable. This statistically significant result indicates that critics concerns of severability doctrine are well-founded; ideology does play a role in severability determinations. From the results, it appears severability serves as a convenient tool for the Court to pick and choose which statutory provisions it wants in effect, echoing the concerns of Noah (1999).

The free speech variable is negative and statistically significant. The Court is less likely to find a statute inseverable when it is challenged with a freedom of speech violation. While there was no formal hypothesis about this variable, it contradicts expectations from the literature that suggest that the Court is more likely to find statutes inseverable when challenged with a freedom of speech violation (Jona 2008). Whether this result is a null result or indicative of a different decisionmaking process should be of

future interest to scholars. Meanwhile, the due process coefficient is statistically insignificant and close to zero.

Finally, a word about selection effects. While not presented explicitly, my model indicates that there sample selection bias that would be problematic outside of a Heckman modelling strategy; these results can be found in the replication materials. They show that failure to account for the Court's discretionary docket creates inferential problems for scholars. Unfortunately, many prior studies that use Heckman models do not explicitly state whether there is evidence of selection bias, instead employing them only because of the possibility of such bias (Hall and Ura 2015, Harvey and Friedman 2009). In future research, scholars should be more explicit about their findings.

4.8. Discussion

This study analyzed the determinants of severability doctrine in U.S. Supreme Court decisionmaking. Despite concern to the contrary, there are systematic influences of the Court's decision to rule a statute inseverable rather than severable. Some of the results support the suspicions of the legal community: the Court does not seem to consistently employ severability clauses in their decisions using severability doctrine but does seem to consistently use its own ideological predispositions. Other results support positive theories derived from political science scholarship: a statute's support by pivotal policymakers in Congress influences how it approaches severability doctrine while statutes with severability clauses are more likely to be granted speedy challenges to their constitutionality.

How do these results align with the principle of judicial deference to legislatures? The absence of a predictable relationship between severability doctrine and severability clauses indicates that judicial deference is not an important consideration in cases where the doctrine is relevant. The presence of a predictable relationship between severability doctrine and the Court's ideology further compounds this concerning result. Yet the Court does seem to show deference when it takes into account the preferences of pivotal policymakers towards a statute under review. This deference is not necessarily to the elected officials who created that statute, as would be the case if severability clauses had an effect on judicial decisionmaking. Rather, this is deference to currently serving elected officials who will have to deal with the ramifications of the Court's decision. It is unclear whether this form of deference is more or less desirable. Nevertheless, judicial deference does seem to have a role in the Court's decisionmaking on severability doctrine.

The results of the study indicate that the Court does not consider severability clauses when making decisions. But this finding begs the question: why does Congress include these clauses in the first place? Indeed, there is no existing study that systematically analyzes when Congress includes severance clauses in legislation. The area is ripe for study and will likely yield additional insight into the legislative process.

Additionally, the results of the study also beg questions as to the effects of inseverability clauses. These less common clauses have the opposite function of severability clauses, stating that several, possibly all of the provisions of a statute are inseverable and if one is struck down, all have to be struck down. While these clauses

are rarely adopted by Congress, they are more frequently included in state legislation. There is some evidence that these clauses are taken more seriously than severability clauses by American courts, which could lead to different findings (Friedman 1997). When these clauses are included in legislation and what effect they might have on judicial decision-making are open questions that scholars should consider in future research.

This study is not without limitations. There is concern about the generalizability of the findings, given that the research design focuses on statutes that are regarded as important. But the focus on important statutes excludes statutes with moderate to minor importance. In these cases, it is entirely possible that the results would differ and would be an interesting avenue for future research.

4.9. References

- Bailey, Michael A. 2013. "Is Today's Court the Most Conservative in Sixty Years? Challenges and Opportunities in Measuring Judicial Preferences." *Journal of Politics* 75 (3): 821-834.
- Bailey, Michael A., and Forrest Maltzman. 2011. *The constrained court: Law, politics, and the decisions justices make*. New Haven: Princeton University Press.
- Carter, David B., and Curtis S. Signorino. 2010. "Back to the future: Modeling time dependence in binary data." *Political Analysis* 18(3): 271-292.
- Clark, Tom S. 2009. "The Separation of Powers, Court-curbing and Judicial Legitimacy." *American Political Science Review* 53(4): 971-989.
- Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6 (2):279–295.
- Epstein, Lee and Jack Knight. 1997. *The Choices Justices Make*. Sage Press.
- Epstein, Lee, Andrew D. Martin, A. D., Jeffrey A. Segal, and Chad Westerland. 2007. The Judicial Common Space. *The Journal of Law, Economics, and Organization* 23(2), 303-325.
- Fox, Justin and Matthew C. Stephenson. 2011. "Judicial Review as a Response to Political Posturing." *American Political Science Review* 105(2):397–414.
- Friedman, Israel E. 1997. "Inseverability Clauses in Statutes" *The University of Chicago Law Review* 64(3):903-923.
- Gans, David H. 2008. "Severability as Judicial Lawmaking." *George Washington Law Review* 76(3): 639-697.

- Jona, C. Vered. 2008. "Cleaning up for Congress: Why Courts Should Reject the Presumption of Severability in the Faces of Intentionally Unconstitutional Legislation." *George Washington Law Review* 76(3):698-724.
- Hall, Matthew E. K., and Joseph D. Ura. 2015. "Judicial Majoritarianism." *The Journal of Politics* 77 (3): 818-832.
- Harvey, Anna. 2013. *A Mere Machine: The Supreme Court, Congress, and American Democracy*. New Haven: Yale University Press.
- Harvey, Anna, and Barry Friedman. 2006. "Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000." *Legislative Studies Quarterly* 31:533–562.
- Harvey, Anna, and Barry Friedman. 2009. "Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court's Agenda." *The Journal of Politics* 71: 574–592.
- Ignagni, Joseph and James Meernik. 1994. "Explaining Congressional Attempts to Reverse Supreme Court Decisions." *Political Research Quarterly* 47(2): 353–371.
- Krehbiel, Keith. 1998. *Pivotal politics: A theory of US lawmaking*. Chicago: University of Chicago Press.
- Lewis, Jeffrey B., Keith Poole, Howard Rosenthal, Adam Boche, Aaron Rudkin, and Luke Sonnet. 2017. *Voteview: Congressional Roll-Call Votes Database*.

- Lindquist, Stephanie A., and Pamela C. Corley. 2011. "The Multiple-Stage Process of Judicial Review: Facial and As-Applied Constitutional Challenges to Legislation before the US Supreme Court." *The Journal of Legal Studies* 40(2): 467-502.
- Maltzman, Forrest, Alyx Mark, Charles R. Shipan, and Mark A. Zilis. 2014. "Stepping on Congress: Courts, Congress, and Interinstitutional Politics." *Journal of Law and Courts* 2(2): 219-240.
- Marks, Brian A. 2015. "A Model of Judicial Influence on Congressional Policy Making: Grove City College v. Bell." *The Journal of Law, Economics, and Organizations* 31(4): 843-875.
- Marshall, Bryan W., Brett W. Curry, and Richard L. Pacelle Jr. 2015. "Preserving Institutional Power: The Supreme Court and Strategic Decision Making in the Separation of Powers." *Politics & Policy* 42(1): 37-76.
- Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic ideal point estimation via Markov chain Monte Carlo for the US Supreme Court, 1953–1999." *Political Analysis* 10(2): 134-153.
- Mayhew, David R. 2005. *Divided We Govern: Party Control, Lawmaking and Investigations, 1946–2002*. 2nd ed. New Haven, CT: Yale University Press.
- McGuire, Kevin T. 2004. "The institutionalization of the US Supreme Court." *Political Analysis* 12(2): 128-142.
- Meernik, James, and Joseph Ignagni. 1997. "Judicial Review and Coordinate Construction of the Constitution." *American Journal of Political Science* 41 (2): 447-467.

- Metzger, Gillian E. 2009. "Facial and as-applied challenges under the Roberts Court." *Fordham Urban Law Journal* 36(4):773-801.
- Movsesian, Mark L. 1995. "Severability in Statutes and Contracts." *Georgia Law Review* 30(1): 41-83.
- Nagle, John C. 1993. "Severability." *North Carolina Law Review* 72(1): 203-259.
- Noah, Lars. 1999. "The Executive Line Item Veto and the Judicial Power to Sever: What's the Difference." *Washington and Lee Law Review* 56(1):235-246.
- Poole, Keith T. "Recovering a basic space from a set of issue scales." *American Journal of Political Science* 42(3): 954-993.
- Rainey, Carlisle. 2014. "Arguing for a Negligible Effect." *American Journal of Political Science* 58(4): 1083-1091.
- Roodman, David. 2011. "Fitting fully observed recursive mixed-process models with *cmp*." *The Stata Journal* 11(2): 159-206.
- Segal, Jeffrey A. 1997. "Separation-of-Powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91(1): 28-44.
- Segal, Jeffrey A., and Albert D. Cover. "Ideological values and the votes of US Supreme Court justices." *American Political Science Review* 83(2): 557-565.
- Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
- Sherwin, Emily. 2000. "Rules and Judicial Review." *Legal Theory* 6(3):299-323.

- Spiller, Pablo T., and Rafael Gely. 1992. "Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988." *The RAND Journal of Economics* 23:463-492.
- Stephenson, Matthew C. 2003. "'When the Devil Turns ... ': The Political Foundations of Independent Judicial Review." *The Journal of Legal Studies* 32 (1): 59-89.
- Stern, Robert L. 1937. "Separability and Separability Clauses in the Supreme Court." *Harvard Law Review* 51(1): 76-128.
- Ura, Joseph D. and Patrick C. Wohlfarth. 2010. "'An Appeal to the People': Public Opinion and Congressional Support for the Supreme Court." *Journal of Politics* 72(4):939-956.
- Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45: 346-361.
- Whittington, Keith E. 2007. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in US History*. New Haven: Princeton University Press.

5. CONCLUSIONS

This dissertation has made a number of contributions to our understanding of judicial review. In Chapter 2, I argue that modelling judicial independence as an additive, rather than conditional, predictor of judicial review risks Type II Error in our models. Rather than encouraging the Court to strike down a statute or other government policy, as implied by previous empirical tests of theory, higher degrees of independence for the Court enables it to make decisions based on its own ideological predispositions, whether those predispositions support striking a policy or upholding it. I demonstrate empirically that this conditional modelling strategy is superior. Notably, this modelling strategy finds evidence for Marks' Separation of Powers model and further clarifies the role political fragmentation plays in empowering judicial review.

In Chapter 3, I argue that majoritarian judicial review needs to be considered in light of the separation of powers that characterize most governments with constitutional courts. When these branches have differing policy preferences in the U.S., the Court has different incentives to advance the policy goals of each: Congress provides material incentives and better represent public opinion while the president's unilateral control over the varied functions of its office allow for more targeted persuasion on a given issue. I demonstrate that, under different circumstances, the Court is attentive to both the preferences of Congress and the president, though there is considerably more evidence that the Court supports the president.

In Chapter 4, I examine the Court's approach to severability doctrine when exercising judicial review. Contrary to the assertions of legal scholars, the Court

consistently approaches decisions regarding severability. The Court is more likely to sever an unconstitutional provision when it is ideologically predisposed to striking, a finding that confirms the fears of some legal scholars. But the Court is also more likely to find a provision inseverable when the statute under review is universally popular with current elected officials, a clear showing of judicial deference.

This study is not without limitations. There is concern about the generalizability of the findings, given that the conclusions from every chapter use a single dataset. The research design focuses on statutes that are regarded as salient at the time of passage. Many are also considered landmark statutes in retrospective review. But the focus on important statutes excludes statutes with low political salience. In these cases, it is entirely possible that the results would differ; future scholarship should focus on these statutes.

In addition, this study only uses data from the U.S. Supreme Court. While the Court is one of the most important constitutional courts today, there are many additional constitutional courts in the world. These courts not only vary in their institutional design but also vary in the political contexts in which they operate. It is entirely possible that the relationships here would change in meaningful and interesting ways depending on the constitutional court examined; future scholarship should examine these theories in other constitutional courts.