

**THE SEPARATION OF POWERS: HOW PUBLIC OPINION MATTERS
TO THE SUPREME COURT**

An Undergraduate Research Scholars Thesis

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JACKSON L. ALLEN

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Research Advisor:

Dr. Joseph Daniel Ura

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ABSTRACT

The Separation of Powers: Does Public Opinion Matter to the Supreme Court? (May 2013)

Jackson L. Allen

Department of
Political Science
Texas A&M University

Research Advisor: Dr. Joseph Daniel Ura
Department of
Political Science

The Supreme Court is an institution much revered in American political culture. This study will examine the role of that public support in the decision making of Supreme Court justices in the United States. I will go about assessing this first by measuring the level of public support for the Supreme Court as measured by the General Social Survey (GSS) and cross-tabulating it with data on the frequency of legislation invalidation. Ultimately, I show that the Supreme Court does in fact respond to public opinion, using public support as a power base to strike down a greater number of federal laws. In other words, the Supreme Court is more likely to invalidate a law when it is more popular than the incumbent legislature. My results indicate that there is, in fact, a positive and significant correlation in the data that supports our hypothesis.

DEDICATION

This paper is dedicated to my mother, Karen, and my brother, Ben.

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I am very grateful to Dr. Joseph Ura for his support throughout the process of writing this paper.

CHAPTER I INTRODUCTION

The justices of the United States Supreme Court, though supposedly insulated from politics by their lifetime appointments, are in fact susceptible to a number of the same problems as the other two branches of government. Most notably among them is an issue inherent to almost any political process: when to make decisions strategically rather than sincerely. There are numerous factors in judicial decision-making, including principles of law and justices' personal preferences (Segal & Spaeth, 2002). Additionally, scholars of law and politics also frequently suggest that the federal separation of powers may influence the decisions of Supreme Court justices. Given that one of the Court's principle duties is to ensure that Congress does not pass any laws that violate the Constitution, identifying ways that Congress may influence the decisions of the Supreme Court is a critical problem in American national politics and the process of federal Constitutional development.

It is therefore prudent to examine when, and under what conditions, the Supreme Court chooses to exercise its power of judicial review. There is much scholarship centered on this issue. This paper joins and extends this literature. In particular, I extend Ura and Wohlfarth's theory of the public's influence on Congress's behavior toward the Supreme Court to explain Congress's behavior toward the Supreme Court. These authors claim, "The higher the level of public support for the Supreme Court, the lower the level of congressional support for the Supreme Court." I

aim to examine the separation of powers hypothesis more closely in order to determine whether it is the most effective explanation for the behavior of the Supreme Court. In doing so, I hope to augment the hypothesis with the following addition: that the higher the difference in public support between the Supreme Court and Congress, the more likely it is that the Court will invalidate federal legislation. This study will demonstrate that this hypothesis holds, and accounts how the Court chooses when to take risks invalidating more or fewer pieces of legislation.

CHAPTER II

LITERATURE REVIEW

Before the role of public opinion can even be considered in the process of judicial decision-making, the nature of the justices' voting behavior must be defined. A good starting point for this is to establish the context of the Supreme Court's actions. Scholarship on the issue diverges here, with Segal and Spaeth advocating the attitudinal model (2002), and others such as McGuire and Stimson (2004) and Clark (2009), advocate a separation of powers model.

Segal and Cover (1989) emphasize the role of ideological preference in Supreme Court decision making, making a case for the attitudinal model. Though their study does find support for their hypothesis, it also has a relatively narrow timeframe (they only use data from 1953 to 1988). Furthermore, the authors themselves acknowledge the limitations of theory due to the complexity of the connection between attitudes and behavior, which is discussed at length. This is an inherent flaw in the attitudinal model: it is exceedingly difficult to be certain that the justices are acting solely, or even mostly, on their preferences simply by observing their voting patterns. Conversely, a separation of powers model, such as put forth by Clark (2009), is comparably easier to measure in a model, though there are some elements of selection bias in the Supreme Court's docket, as discussed by Harvey and Friedman (2006) and (2009). The separation of powers model acknowledges that justices are part of a political system and thus their decisions

will be more based on political strategy, especially the interaction between Congress and the Supreme Court.

The separation of powers hypothesis puts public opinion at the center of this interaction between the legislature and the judiciary. Ura and Wohlfarth (2010) note that public support can insulate the Supreme Court from legislative pressure. Moreover, they discuss how Congress and the Supreme Court are engaged in a competition for public agency, saying:

Over time, the public might empower or challenge its agents as they become more or less protective of its liberties and interests. Second, judgments about the faithfulness and fitness of one branch of government as a public agent are relative. A public signal to increase the power or influence of one branch is implicitly a signal to diminish the relative standing of the remaining branches. (Ura and Wohlfarth, 2010, 942)

In this competition for public agency the metric is public support. In other words, the best way for a branch of government to determine its power relative to the other branches is to look at its relative level of public standing. When the Supreme Court enjoys a greater amount of public support than the other branches, it can effectively fend off Congressional pushes for control.

The Court acts in a political environment, no matter how insulated from politics its justices may be. Vanberg highlights the importance of this environment, along with that of other external factors, such as the amount of transparency in the legislature (2001). From Vanberg, we

understand that the Supreme Court is willing to defy the wishes of the legislative branch (i.e. to invalidate legislation) provided it has enough public support to prevent punishment from Congress. These punishments can range in severity, although we rarely see them used. This rarity is well explained by Segal, Westerland, and Lindquist (2011), who equate Congressional constraints on the Court to a “nuclear attack”.

It is very often the case that high courts enjoy much more public support than other branches of government, as demonstrated by Gibson, Caldeira, and Baird (1998), who find evidence of this in almost every Western democracy they examine. In fact, in the United States at least, public support is the exclusive source of legitimation for the judicial branch. This is outlined by Alexander Hamilton in the Federalist 78 (1787) and seconded by Caldeira (1986) who expands on the idea that the Court has the power of “neither the purse nor the sword”.¹

¹ This in turn raises the question: how does the Court actually *get* its legitimacy from the people? A well-reasoned explanation can be found from Jeffrey Mondak (1994) who takes a sociological approach to the issue of legitimation. The crux of Mondak’s argument is that the Supreme Court enjoys “source credibility” because of its institutional status. As a result, the institutional legitimacy it already enjoys couples with this source credibility to create policy agreement, which then leads to policy legitimation. An excellent case in point here is made by Gibson, Caldeira, and Spence (2003) writing about the decision of *Bush v. Gore* in 2000. Because the Court derives its legitimacy from the people, it follows that the justices may take public opinion into consideration when voting.

Moreover, a trend begins to emerge that people's reverence of the Court is a considerably powerful sociological tool. It also becomes evident that this relationship goes both ways, as the Supreme Court relies on the people for legitimation. This dependence on public support should mean that the justices of the Court will account for public opinion in their decision-making. Public opinion could be the deciding factor in a potentially controversial Supreme Court decision, giving the Court a greater sense of security in making such a ruling. In this sense, then, public opinion is a form of political capital. Clark does not dispute this point, but his research gives the impression of a more indirect relationship, wherein the Court is responsive to public opinion only insofar as it interprets it based on the actions of Congress. His data give credence to such a model, where the justices of the Supreme Court measure their level of public support by looking at the number of court curbing bills introduced. However, this can be attributed to the nature of his model, the explanatory power of which is discussed in a later section. This notion seems inconsistent with reality though, as justices are arguably just as exposed to public opinion as anyone else, why should they rely on a third party in the form of Congress? A more compelling theory, then, is that the Supreme Court justices respond to public opinion because it is in their interest to maintain their legitimacy, which they can do only with the support of the public. In this case, the justices of the Supreme Court may look to the court curbing bills, as suggested by Clark, but will also seek alternative – and more direct – sources of information, such as the media.

However, Segal and Spaeth (2002) systematically refute the idea that the justices of the Supreme Court respond to public opinion at all. Rather, they posit instead that justices vote based solely on their preferences; this is known as the attitudinal model. Rather than employing the attitudinal model, I find that empirical evidence favors a dominant role for public opinion in Supreme Court decision-making. Perhaps the most compelling case against the attitudinal model is that made by McGuire and Stimson (2004) which uses a time-series model focused exclusively on reversals made by the Court to indicate how liberal the Court is over time. Whittington (2005) also provides justification for the role of public opinion in judicial decision-making: the Court can be a vehicle to overcoming “obstruction”, such as the Supreme Court was for the issue of desegregation in *Brown v. Board of Education* (1955). Whittington also refutes Mishler and Sheehan’s (1993) conception of the Court as countermajoritarian. So now that the role of public opinion is established, what remains is to determine how the Court acts on it.

Ura and Wohlfarth (2010) outline their separation of powers hypothesis (as stated above) in order to model the role of public opinion in judicial-legislative relations and in judicial decision-making (i.e. how the Court votes and why it votes that way). Segal, Westerland, and Lindquist (2011) draw the distinction between a “rational-anticipation model” and an “institutional-maintenance model”. In the former, the Court “moves away from its preferences to avoid being overruled”, whereas in the latter the Court, “protects itself against Congressional attacks to its institutional prerogatives by scaling back its striking of laws when the distance between the Court and Congress increases.” (Segal, Westerland, Lindquist 2011) While Knight and Epstein

(1996) make the case for “institutional emergence and maintenance” with an extensive historical example, Lindquist and Solberg (2007) emphasize the role of judges’ ideological preferences. The rational anticipation model is well supported by McGuire and Stimson (2004) who argue that the Supreme Court justices will rationally anticipate the reaction of the public when making decisions.

The main benefit of McGuire and Stimson’s research for my purpose is that they have a very carefully designed model. Although Sala and Spriggs’ (2004) data “strongly rejects the [separation of powers] model” it does lay out some very high standards for what an ideal research design in the field would do. My theory will focus on the role of public support not just for the Supreme Court, but also for Congress. The notion of ideological divergence between these two branches of government is thus inherently valuable in my research design.

CHAPTER III

THEORY

My addition to the separation of powers hypothesis as put forth by Ura and Wohlfarth focuses on the role of public opinion as the source of power and legitimacy for the Supreme Court. While Ura and Wohlfarth pose the question, “Why does Congress choose to govern under the constraint of judicial review?” (2010, 940) I am more concerned with why the Supreme Court would choose to constrain itself by following public opinion. However, the underlying principle that, “public sentiment in support of judicial authority constrains an election-minded Congress from exercising its prerogatives to undermine federal courts,” (Ura & Wohlfarth, 2010, 939) still holds.

Current scholarship is necessarily incomplete, however I believe that my approach can give potentially greater insight into the way Supreme Court justices behave. Also, my approach will further refute the attitudinal model by showing a statistically significant relationship between justices’ decisions and public opinion. Provided that I can single out a causal mechanism, my study should identify another facet of the highly complex process that is Supreme Court decision making.

So, in keeping with the separation of powers hypothesis, I posit that: the greater the level of public support for the Supreme Court, provided that it surpasses that of Congress by a noticeable margin, the more likely the Court is to strike down legislation as unconstitutional. Furthermore, I posit that: when public support for Congress exceeds that of the Supreme Court by a noticeable margin, the Court will follow a rational-anticipation pattern of behavior and curb the amount of laws it invalidates.

Ura and Wohlfarth reason that Congress is mainly deterred from undermining the authority of the Supreme Court by public support for the judiciary (2010). In the same vein, I argue that the justices of the Supreme Court, being acutely aware of that fact, will take greater liberties with their power when they know that congressional backlash will be more effectively checked by a lack of public support. Thus it follows logically that the Supreme Court would seek to respond to public opinion in real time in order to more closely gauge its power relative to the legislature.

CHAPTER IV

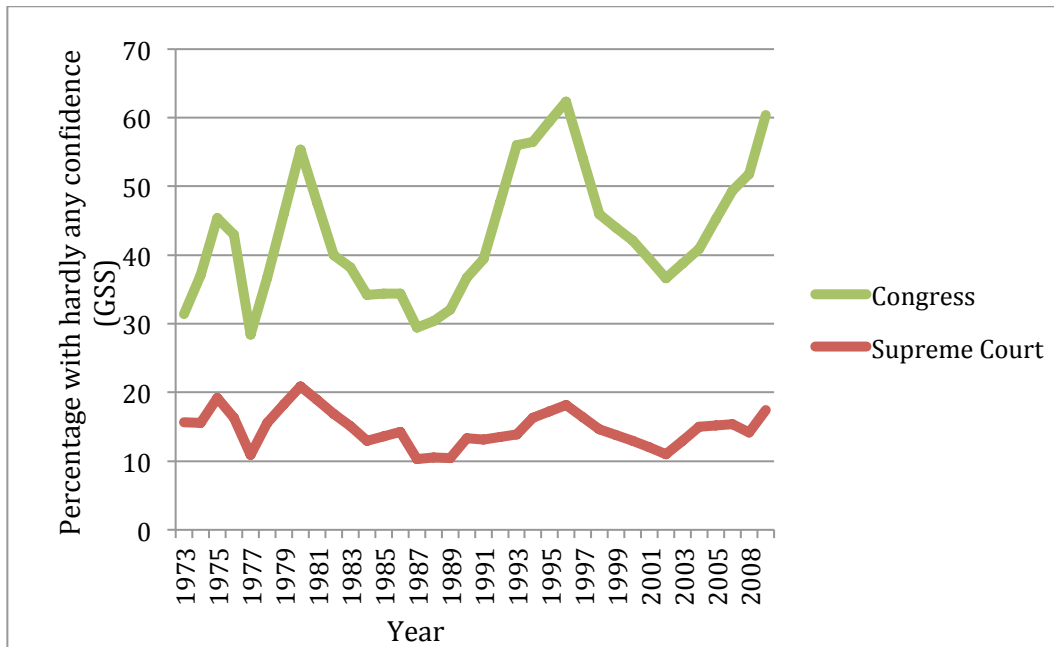
ASSESSMENT

Support for Congress and the Supreme Court were measured by use of the General Social Survey (GSS), which posed the question “I am going to name some institutions in this country. As far as the people running these institutions are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them?” to a random sample of Americans in most years starting in 1973. The responses to these questions, with the named institution being Congress and the Supreme Court, have been coded from one to three, with three being “a great deal of confidence”. Through the Survey Documentation and Analysis (SDA) database, created by the University of California – Berkeley, I have accessed these data and aggregated the proportion of responses coded “1” (i.e. “hardly any confidence”) for Congress and the Supreme Court; Figure 1 shows these data.

My study replicated Tom Clark’s (2009) model on court curbing bills and then extended it to include additional data on public opinion. This model runs a Poisson regression using the number of court curbing bills proposed by Congress in a given year, along with the GSS data on confidence in the Supreme Court, and accounts for opposition in Congress. My replication of his test will add the data on public confidence in Congress, and will also update the data on public confidence in the Supreme Court to reflect the GSS administrations since 2009. This model is

based on two central assumptions: that “making a decision that is politically and publicly rejected due to a lack of public support for the judiciary is costly for the Court; [and that] failure to represent constituency preferences has negative political consequences for the legislature.” (Clark, 2009: 974) Essentially, this sets out what constitutes failure for each branch. Empirically, Clark’s model is rooted in the concept of “signaling” (2009: 977), which is the notion that the Supreme Court’s main source of information on its level of public support comes from its observance of the presence or absence of court curbing legislation from Congress. My extension of the model is based on an alternative, more direct form of response to public opinion by the Supreme Court. In my model, the main explanatory variables should be those representing the number of people who have hardly any confidence in the Supreme Court or Congress (i.e. public opinion).

Figure 1



A cursory examination of this data immediately reveals a consistently higher amount of public support for the Supreme Court as compared to Congress. While the GSS figures related to the Court were already a factor in Tom Clark’s study, I have added the figures on confidence in the legislature, with the hopes of creating a more complete picture. I have replicated his test – a Poisson regression – with the addition of my data on support for Congress; the results are shown below in Table 1. The test should show that part of what appeared to be explained by the GSS data on confidence in the Court, is actually accounted for by the GSS data on confidence in Congress.

Table 1

| Variables | Without Congress Data | With Congress Data |
|---------------------------------|------------------------------|---------------------------|
| Bills | -1.53 | -1.22 |
| | (0.61) | (0.53) |
| Low Confidence in SCOTUS | -0.06 | -0.21 |
| | (0.31) | (0.08) |
| Low Confidence in Congress | - | 0.07 |
| | - | (0.03) |
| Opposition in Power in Congress | 0.10 | -0.21 |
| | (0.69) | (0.79) |
| B.I.C. | 128.90 | 128.00 |
| A.I.C. | 187.82 | 186.93 |

Note: I have controlled for the role of national courts in this regression. Robust standard error is shown in parentheses. The model being replicated is a Poisson regression where $n = 36$.

In addition to these data, I have measured the Akaike Information Criterion (AIC) and Bayesian Information Criterion (BIC) tests to measure the model’s explanatory power. The closer a model’s AIC/BIC scores are to zero, the more accurately they can be said to explain reality. A

drop in the scores should be expected in my model if the addition of my variable has augmented the model's explanatory power.

CHAPTER V

RESULTS & ANALYSIS

As is evident from Figure 2, the introduction of my variable – the number of people with “hardly any confidence” in Congress – changes the model noticeably. The variable “Bills” which signifies the explanatory power of the Court’s response to court curbing legislation, drops from -1.53 in the old model to -1.22 with my additional data, showing that part of what was being explained by that variable in Tom Clark’s model, is actually attributable to my variable – low confidence in Congress – and the variable for low confidence in the Supreme Court. With the addition of my data the strategic interaction between Congress and the Supreme Court can be more readily observed. As such, the beta coefficient for the court curbing bills drops. This demonstrates that the Supreme Court is responding directly to public opinion, rather than using Congress as a medium. The standard error for the court-curbing variable also drops from .61 to .53, indicating a better fit. Robust standard error essentially measures the fitness of a model by showing how much of it could simply be explained by natural variance in data or coincidence. Overall, the drop in the value beta coefficient and the decrease of the standard error show that the role of court curbing legislation is less integral to the model than was previously suggested by Clark (2009).

The beta coefficient for low confidence in the Supreme Court more than triples from $-.06$ to $-.21$ in my model, showing that some of what was being explained by the variable “Bills” in Clark’s study is actually being accounted for by low confidence in the Supreme Court (and Congress). Again, the robust standard error decreases markedly from $.31$ to $.08$, showing better fitness of this variable with the addition of my data. The drop in robust standard error, coupled with the threefold increase of the beta coefficient is indicative of a large increase in explanatory power. This is also related to the decrease in the beta coefficient of the variable “Bills”; the addition of my variable has cleaned up the model and revealed the role of direct response to public opinion.

My variable, low confidence in Congress, has a beta coefficient of $.07$ and a standard error of $.03$, making it statistically significant at the 95% confidence interval. This variable makes up the other half of the role of direct response to public opinion in this model. When paired with the data on low confidence in Congress, the data on low confidence in the Supreme Court also become far more meaningful statistically. Additionally, both the BIC and AIC scores decrease in my model, again indicating increased statistical significance and a better fit for the model.

The third variable, representing opposition power in Congress, consistently has a low beta coefficient and high robust standard error. This translates to a low amount of explanatory power for the role of internal Congressional politics in Supreme Court decision making. The emphasis

remains on public opinion in order to explain that. The high robust standard error further undermines any correlation that might be present as spurious.

The changes in the beta coefficients for the two original variables correspond to the portion of the data that is actually accounted for by my variable. The introduction of my variable is more broadly indicative of how the justices of the Supreme Court are interpreting and responding to public opinion. In Clark's original model, which does not account for public opinion of Congress, Clark arrives at an interpretation of the data that essentially shows the Supreme Court justices responding to public opinion in an indirect way (i.e. using Congress as a medium). Although Clark's model has the correct basic theoretical framework, the conclusion that he reaches makes it seem as if the Supreme Court mostly responds to public opinion in a very roundabout way, by looking at the number of court curbing bills proposed. Clark's main variable, "Bills", seems an untenable explanation of the realities of judicial politics, especially given that the number of court curbing bills proposed does not necessarily equate to the number that will pass. On the contrary, my model shows the justices of the Court actively responding to public opinion in a more direct way. This model is generally supportive of a Supreme Court that exists with the sphere of the separation of powers and that takes its cues from the public directly rather than using Congress as some sort of middleman. This has broader implications for the separation of powers model, namely showing that the role of public opinion in judicial decision-making has yet to be completely defined. Support for this model can be readily found in the aforementioned changes in the beta coefficients, BIC/AIC tests, and robust standard errors.

My tests have shown that the role of public opinion in judicial decision-making goes deeper than was originally assumed. The relationship between the justices of the Supreme Court is still hard to fully define and interpret, but it is clear that they are certainly responding to the public mood in a measureable way. Overall, this relationship is one that bears much further examination. The Supreme Court is an institution so essential to the function of the American government, and so revered by the American people, that it is vital to understand how the public can affect its political behavior. As the Supreme Court continues to rule on issue of major social importance, such as individual healthcare mandates or marriage equality, its nine justices will find themselves under more and more public scrutiny. While it has been resolved that the Supreme Court justices are hearing the voice of the people, the extent to which they are acting on it remains to be seen. However, the data presented here makes a strong case for a Court that heeds public opinion and acts on it. Further study in the field should help to determine with greater precision how public opinion affects the voting behavior of Supreme Court justices

CHAPTER VI

CONCLUSIONS

The three branches of the United States government are perpetually in a struggle to push their own agendas and ideas through. Nevertheless, they do not operate in a vacuum. While Congress and the President have relatively clear-cut and easy to identify platforms and policy agendas, the Supreme Court is a branch of government more commonly thought of as being apolitical and above the fray of it all. Yet it has become increasingly clear from modern judicial political scholarship that this is not the case. Moreover, the justices of the Supreme Court, with their life appointments, are given a great deal of political power without any of the accountability mechanisms imposed on their fellow members of government in the other two branches. The question of why they should even bother listening to the opinion of the public, then, is of great relevance to the field of judicial politics, and to anyone seeking to understand the political atmosphere of the United States.

In an effort to understand how, if at all, the Supreme Court responds to public opinion, scholars such as Vanberg have put forth game theoretical and statistical models showing the relationship between Congress and the Supreme Court. Vanberg specifically shows that the Supreme Court will take more risks in invalidating legislation when it knows it has the support of the public.

Tom Clark created an in depth statistical model by using the number of court curbing bills introduced by Congress in a year, and the number of people who responded that they had “hardly any confidence” in the Supreme Court in the GSS, in a Poisson regression. His model and his work were foundational to this paper, which is simply a replication of his model with supplementary data. Ura and Wohlfarth’s work on public opinion and the separation of powers hypothesis was also of use especially when considering the argument that the Supreme Court is a political actor competing with Congress and the President for public agency. This consideration was also foundational in creating my hypothesis that became the basis of this paper.

The separation of powers hypothesis was crucial in considering the role of public opinion in relations between Congress and the Supreme Court. Ura and Wohlfarth lay the groundwork for my model by providing their separation of powers hypothesis, which characterizes the power struggle between Congress and the Supreme Court in terms of public opinion. I posited that one of the implications of the separation of powers hypothesis would be a Supreme Court that responded to public opinion in a direct way, as opposed to through Congress, and that Congress and the Supreme Court would both seek public support for different reasons. Congress, being an elected body, has less need for the legitimizing effects of having public opinion on their side, but can still use that public support to bolster their efforts to check the power of the Supreme Court. The Court, however, needs public support for its actions as it lacks any means of enforcement or coercion. Overall, this led me to theorize that the greater the difference in public support between

the Supreme Court and in Congress, the more risks the Supreme Court would take in invalidating legislation.

In order to test my hypothesis, I looked to Tom Clark's (2009) model on court curbing legislation and its effect on judicial behavior. Clark ran a Poisson regression using the number of court curbing bills put forth by Congress, regressed on the number of people who responded that they had "hardly any confidence in the Supreme Court" in the GSS. I introduce my own data (also taken from the GSS) about the number of people who said they had "hardly in confidence in Congress" and then replicated his test. The results showed that the model had been significantly improved from a statistical standpoint. The beta coefficients of Clark's variable on court curbing bills dropped in favor my variable, which was proven to be statistically significant at the 95% confidence interval. Furthermore, the robust standard errors, BIC, and AIC scores all dropped noticeably with the introduction of my data.

Broadly speaking, my replication of Clark's test lends support to a model of judicial politics in which the Supreme Court is acutely aware of its level of public support. This finding makes an attitudinal model in which the life-appointed justices of the Court simply vote based on their personal preferences look increasingly unconvincing. My model also demonstrates that there are restrictions on the Supreme Court's role as an overseer of the other two branches beyond those

designed into the framework of the Constitution. The Supreme Court will be far more reluctant to take a risk by invalidating a piece of controversial legislation if they know that they lack sufficient public support to compete with that of Congress. In a world where the Supreme Court is increasingly the subject of mass media coverage, and where Congress is increasingly the subject of mass public derision, this is a particularly helpful lens through which to view the Supreme Court and its actions. There is certainly much more to be done on the subject of public opinion and its relevance to the judiciary's political struggles with the legislature. Hopefully the discoveries that have been made here will be expanded upon, possibly by finding a more robust measure of public support than the GSS, which is fairly recent and has not been consistently administered since its inception. In any case, it is clear that there must be further investigation into the complex relationship between the Supreme Court and Congress. . Hopefully this will one day lead to a comprehensive model of judicial decision-making. Ultimately, one thing is clear: if the Supreme Court justices are simply voting their preferences then their preferences are highly attuned and highly connected to those of the people.

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