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# Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model

**Jeffrey A. Segal** Stony Brook University  
**Chad Westerland** University of Arizona  
**Stefanie A. Lindquist** University of Texas

*Recent scholarship suggests that the U.S. Supreme Court might be constrained by Congress in constitutional cases. We suggest two potential paths to Congressional influence on the Court's constitutional decisions: a rational-anticipation model, in which the Court moves away from its preferences in order to avoid being overruled, and an institutional-maintenance model, in which 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. We test these models by using Common Space Scores and the original roll-call votes to estimate support in the current Congress for the original legislation and the Court's preferences over that legislation. We find that the Court does not appear to consider the likelihood of override in Constitutional cases, but it does back away from striking laws when it is ideologically distant from Congress.*

When President Jimmy Carter reactivated draft registration in 1980, he asked Congress to amend the existing law to require both males and females to register. After holding extensive hearings on whether to require women to register, Congress refused to amend the law and appropriated only enough money to administer the registration of males.

In 1981, the Court ruled on the constitutionality of the male-only Military Selective Service Act (MSSA) in *Rostker v. Goldberg* (1981). The Court upheld the law by a 6–3 vote, with White, Marshall, and Brennan dissenting. The majority essentially sidestepped the heightened scrutiny test of *Craig v. Boren* (1976), and instead noted that because women were not eligible for combat, women and men were not similarly situated. Congress was therefore justified in excluding women from draft registration. Further, the majority opinion included a lengthy discussion of the importance of deferring to Congress in matters related to the raising of an army.

Interestingly, the majority in *Rostker* included Justices Stevens and Blackmun. Just two months earlier, Stevens dissented from the Court's decision allowing gender-based differences when it came to underage sex (*Michael M. v. Superior Court*, 1981). Blackmun concurred in the result, but rejected the Court's analysis that the law was justified because males and females were “not similarly situated,” relying instead on the *Craig* standard. While one could imagine legal or attitudinal justifications for Stevens to accept gender-based differences in *Rostker* but not in *Michael M.*, or for Blackmun to accept the “not similarly situated” analysis in a case dealing with the draft but not in a case dealing with (underage) sex, an additional possibility is that in *Michael M.* the Supreme Court was facing off against a state legislature, while in *Rostker* the Court was facing off against a Congress that had made its preferences quite clear, and might in fact have taken further action given an unfavorable Court decision (Rosenberg 1992). In fact, on the very day

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Jeffrey A. Segal is Chair of Political Science and SUNY Distinguished Professor at Stony Brook University, Stony Brook, NY 11794-4392 (jeffrey.segal@stonybrook.edu). Chad Westerland is Associate Professor of Political Science, School of Government and Public Policy, University of Arizona, 315 Social Sciences Building, Tucson, AZ 85721-0027 (cwestler@email.arizona.edu). Stefanie A. Lindquist is Thomas W. Gregory Professor of Law at the University of Texas School of Law, 727 E. Dean Keeton St., Austin, TX 78705 (SLindquist@law.utexas.edu).

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Rostker was argued, Congressman Billy Lee Evans (D-Ga) introduced legislation to deny the federal courts jurisdiction over statutes providing for male-only drafts (HR 2791). Although it is impossible to know precisely how Congress might have responded to an adverse Court decision, members of Congress may have been reluctant to amend the MSSA to force women to register for the draft. It is therefore possible that the Court's decision represented an example of strategic deference to a coordinate branch.

Of course, for strategic deference to make sense, other political actors must actually be able to respond effectively to the Court's decisions. We examine two tracks to Congressional response.<sup>1</sup> The first type of response is reversal of the Court's decision by ordinary legislation. The effectiveness of this response is open to question, in that the Court can declare legislative overrides of its constitutional decisions null and void. Yet scholars have claimed that Congress regularly (Meernik and Ignagni 1997) and effectively (Dahl 1957) overrides (or at least circumvents) constitutional Court decisions by ordinary legislation. At the very least, members of Congress may strategically respond to declarations of unconstitutionality when creating subsequent legislation (Pickerill 2004). Though the interpretation of the Meernik and Ignagni data has been subject to debate (Pickerill 2004), a more general belief that Congress can effectively respond to constitutional decisions remains.

Congress's alternatives are not limited to override, however. If it chooses, Congress can act to undermine the Court's institutional authority by removing jurisdiction, limiting budgets, refusing to grant pay raises, or a host of other actions (Perry 1982; Rosenberg 1992). Under these circumstances, Court responsiveness to potential Congressional action does not require that the justices anticipate Congress's specific policy response in any particular case; rather, it requires that the Court senses if and when it is in a vulnerable position and that it acts more deferentially in those periods. Indeed, scholars have documented periods in history in which the Court has retreated from unpopular rulings in the light of Congressional pressure (Handberg and Hill 1980; Nagel 1965; Toma 1996).

In this paper, we test both tracks to Congressional influence: the rational anticipation of the separation of powers model and, because it makes fewer demands on the Court's foresight, a more boundedly rational institutional maintenance model. We test the former by estimating the preferences of the current Court and the current Congress over the challenged legislation to determine whether the

Court rationally anticipates being overturned in the instant case and proactively capitulates. We test the institutional maintenance model by examining factors that do not require the Court to know whether any particular case will be overturned, but nevertheless might cue the Court that it is acting in a hostile environment and thus should be wary.

We find that the Court does not appear to be constrained by expectations of Congressional override and thus does not appear to be rationally anticipating Congressional action vis-à-vis the individual case under consideration. On the other hand, controlling for the Court's own preferences over the legislation, we find the Court is substantially less likely to strike legislation when it is ideologically distant from the House, Senate, and President, as the elected branches could then act against the judiciary by curbing its institutional authority or undermining its institutional resources. That is, the Court is not necessarily driven by the likely legislative response on the individual enactment at issue, but rather appears to appreciate its position in the broader ideological context governing the status quo at the time it renders its decision. Perhaps because of its institutional vulnerability when its central ideological tendency deviates from the prevailing policy preferences of legislators in the two chambers (and the Presidency), the Court curbs its exercise of judicial review by invalidating fewer federal statutes. Contrary to the conventional wisdom regarding constraints on Supreme Court decision making in constitutional cases, we find evidence for one form of constraint in relation to the Court's interest in institutional maintenance.

## Paths to Congressional Influence

**Rational Anticipation.** The separation-of-powers model examines the degree to which courts must defer to legislative majorities in order to prevent overrides that result in policy outcomes worse than what the court might have achieved through more sophisticated behavior. In the landmark work, Brian Marks (1988) carefully examined the placement of preferences in Congress that prevented *Grove City College v. Bell* (1984) from being overturned prior to 1986.<sup>2</sup> While Marks claimed that the justices simply voted their ideal points, subsequent "neo-Marksist" theorists argued that if the Court exercised rational foresight, it would not always place case outcomes at its own ideal point (Ferejohn and

<sup>1</sup>By "Congress" we mean law-making majorities, including the President.

<sup>2</sup>As Marks explains, Senate Judiciary Committee Chair Orrin Hatch (R, UT) kept override legislation bottled up in his committee.

Shipan 1990; Gely and Spiller 1990). Epstein, Knight, and Martin phrase the motivating assumption behind separation-of-powers models as simply as possible: “why would justices who are preference maximizers take a position they know Congress would overturn?” (2001, 591). While this model was developed to explain the Court’s statutory decisions, evidence suggests that it may be applicable in the constitutional realm (Dahl 1957; Epstein, Knight, and Martin 2001; Meernik and Ignagni 1997).

Under the rational anticipation model, the Court must predict the likelihood that it would be overturned. While there are a variety of ways that the Court might conceptualize this process, we adopt Krehbiel’s (1998) notion of pivotal politics (while remaining open about the specific form of the model, including the role of gatekeepers). For the sake of explaining the model, we use as a running example the case of liberal decision by the Supreme Court, such that conservatives in Congress favor override. Nothing changes except the particular pivot points if the Court issues a conservative decision that liberals in Congress wish to override.

Under pivot models, there can be a variety of people who must support legislation for it to pass. In a single-chamber legislature with no agenda control, the pivotal person would be the median of the chamber. If there are two chambers and the legislation is preferred by those on the right as compared to those on the left, the pivotal player would be the left-most of the two medians. If that player supported the legislation, so too, according to the model, would all of those to the median’s right, as would the median of the other chamber and at least half the legislators in the other chamber. In Figure 1, that player would be the House median.

While this model can and will get substantially more complicated, the concern for the Court is the likelihood that the pivotal player will support override legislation if the Court strikes the law. Under the rational anticipation model, the higher that likelihood, the less likely the

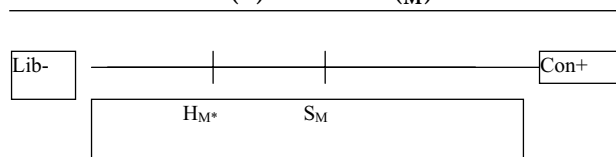
Court should be to strike the law. In this very important sense, this model is case-specific: the Court develops a probability assessment of the likelihood of Congressional override in the instant case and restrains its own behavior accordingly. The model requires the Court on some level to predict how a contemporary legislature (or the pivotal players) would act if the enacted bill were to be reconsidered.

While the rational anticipation model is straightforward, supporting empirical evidence is far from conclusive. For the most part, scholars have tested the model in the context of statutory interpretation. Of this evidence, the seemingly most impressive quantitative support comes from Spiller and Gely (1992), who find that changes in the ideal points of relevant members of Congress influence Court decisions in NLRA cases to the same extent that changes in the ideal points of the Supreme Court do. Unfortunately, their models for the most part fail to distinguish sincere from sophisticated behavior and in the one model that does make the distinction, they fail to include a necessary control for the justices’ preferences that would have prevented statistical bias in their estimates (Segal and Spaeth 2002, 333–40).<sup>3</sup> Other research testing whether the justices are constrained in cases involving statutory interpretation has found little or no evidence in support of the thesis (see Segal and Spaeth 2002, chap. 8 for a review). As for constitutional interpretation, although some have argued that Congress can and does statutorily override or circumvent specific constitutional decisions (Dahl 1957; Epstein and Knight 1998; Fisher 2001; Meernik and Ignagni 1997), no systematic evidence has yet been brought to bear directly on whether the Court rationally anticipates such action in individual cases.

**Institutional Maintenance.** While it is possible that the justices rationally anticipate Congressional override of individual constitutional decisions, override is not the only path to legislative influence over the Court. Scholars have recently put forward a number of factors that could constrain the Court even, or especially, in constitutional cases. These factors do not involve reversal of judicial doctrine but rather are mechanisms that might be used to influence the Court in its decision making in general.

Rosenberg (1992) provides a list of 10 such mechanisms, all which he argues have been attempted by either

**FIGURE 1 Pivots in Bicameral System without Agenda Control: House (H) and Senate (S) Medians (M)**



\* = pivotal player. + = more likely to support override; - = less likely.

<sup>3</sup>While Bergara, Richman, and Spiller (2003) correct for the errors noted above in the Spiller and Gely article, the models that do so find positive and significant results in one model, but negative and statistically significant results in their three remaining models.

Congress, the president, or both at some point in American history. This list includes withdrawal of the Court's appellate jurisdiction, slashing the budget, and altering the size of the Court (cf. George 2003). We would add holding up pay increases to the list. Note that each of these steps could be taken by means of ordinary legislation. For Epstein, Knight, and Martin (2001), successful attempts to curb judicial authority are extremely costly to the Court, and they argue that even unsuccessful attempts incur costs to the Court by damaging the Court's legitimacy. Cross and Nelson (2001) concur, asserting that the only thing Congress can do to the Court in statutory cases is reverse the Court's decision, which leaves the Court no worse off—at least from an institutional standpoint—than if it had initially taken Congress's preferred path. But in the constitutional realm, “the courts are more likely to be responsive to other sources of influence, ranging from threats of impeachment to controls on jurisdiction to budgetary pressures to reluctance to implement the spirit or the letter of the courts' opinions. Cumulatively, these influences are potentially significant and may substantially impact judicial decision-making” (1437). As Segal and Spaeth note, the Court can be expected to back down whenever Congress mounts a clear and imminent threat to the Court's authority (2002, 350).

A tempting response to the institutional mechanisms that Congress does have over the court—impeachment, removal of appellate jurisdiction, etc.—is to claim that these mechanisms are so rarely used that they could not possibly threaten the Court. But positive theorists offer the rejoinder that that is exactly the point: the rarity of their use may be because the Court is effectively constrained. Rogers notes that while Congressional discipline of the Court may be rare because it is difficult to achieve, it is also possible that “we do not observe justices being disciplined for their constitutional decisions because, as the SOP equivalent of nuclear war, the cost to them is so HIGH that they act strategically (to avoid) precisely that sort of devastating retaliation” (quoted in Segal and Westerland 2005, 1338). Walter Murphy made the same observation almost 50 years ago when he suggested that one reason why political attacks on the Court “have rarely resulted in Court-curbing legislation or . . . policy-changing legislation or constitutional amendments may well be the advantage which both sides have seen in compromise over all-out conflict” (1964, 174).

Empirically, some evidence supports judicial deference to Congress in constitutional cases, even if the exact mechanism driving this dynamic relationship has not been uncovered. At the very least, case studies have highlighted certain specific instances in which the Court has

appeared to respond to Congressional and/or presidential preferences in reaching constitutional decisions (Clinton 1994; Epstein and Walker 1995; Knight and Epstein 1996). While revealing, these studies cannot answer whether the Court engages in such behavior in a systematic manner or at substantively meaningful levels. More systematically, Martin (2000) finds the Supreme Court responsive to executive branch preferences, though not Congressional preferences, in constitutional civil rights cases. Further, Harvey and Friedman (2006) contend that the increase in the number of federal laws declared unconstitutional after 1994 is evidence that a strategic conservative Court finally found itself free to overturn legislation at will after the 1994 midterm elections. Nevertheless, neither article fully answers the question. Martin's finding of presidential, but not Congressional, influence, remains puzzling, while Harvey and Friedman's limited period of time in their analysis (1987 to 2000) and their decision to use the length of time a Congressional statute survives, do not allow for clear conclusions about the extent to which the Court is constrained in constitutional cases.<sup>4</sup> More recently, Lindquist and Spill (2007) present evidence suggesting that the Supreme Court's decisions in judicial review cases is determined in part by the ideological preferences of Congress, but they simply test whether the preferences of the sitting Congress constrain the Court and do not have measures of Congressional or Court preferences over the specific legislation at issue. Looking at the total number of bills struck down in a given term, Clark (2009) finds that the Court strikes down fewer laws when Congress considers an increasing amount of court-curbing legislation.

The model of institutional maintenance that we propose here thus differs from the rational anticipation model in one important theoretical aspect. The idea of institutional maintenance focuses on the justices' recognition of their institution's vulnerability to retaliation rather than on the specifics and policy outcome of any given case. The focus then, is on the general political conditions facing the Court, rather than on the likelihood of reversal in a particular case. As Walter Murphy recognized in his analysis of judicial strategy, any battle with Congress, “if it must be fought at all, should be fought at the time and under the political conditions most favorable to the cause

<sup>4</sup>Harvey and Friedman use various duration models, and among other concerns, this means they have almost no variance in their dependent variable (22 of the 29,675 observations yield 1's, the rest are 0's). Their major finding is that a constrained Court, which describes the Court for Harvey and Friedman pre-1994, has roughly a 0.0001% chance of declaring a law unconstitutional, while the predicted probability of overturning a law for the post-94 unconstrained Court is about 0.001%.

2 of the Justice, not merely whenever an individual litigant  
3 chooses to challenge the validity of a statute” (1964, 157).  
4 Because the Court faces the danger of a counterattack  
5 “against the Court itself” when political conditions are  
6 not favorable, the Court must be cautious about its ac-  
7 tions (157) Murphy further recognized the importance  
8 of these constraints in the context of constitutional deci-  
9 sions, a topic to which we now turn.

## 12 Differing Judicial Motivations 13 in Constitutional Cases

14 To review, to the extent that the Court is concerned about  
15 constitutional override, as in the statutory SoP model, it  
16 will have to rationally anticipate Congressional reaction  
17 on a case-by-case basis and trim its sails in those situa-  
18 tions where the justices believe Congress would overturn  
19 (Epstein, Knight, and Martin 2001, 591). Alternatively,  
20 concern about institutional maintenance does not require  
21 the same level of foresight regarding specific decisions and  
22 the likelihood of override. Rather, justices need only sense  
23 when they might be in institutional danger and should  
24 ratchet back confrontational behavior with Congress in  
25 those circumstances. Here the expected Congressional re-  
26 action to individual decisions is less salient. Instead, the  
27 Court is likely to be sensitive to its position relative to the  
28 Congress and the President with respect to its broader  
29 ideological preferences.

30 A key difference between the constitutional and statu-  
31 tory model, then, may be found in the motives underlying  
32 the justices’ decisions in these two types of cases. In the  
33 context of statutory interpretation, the theory holds that  
34 strategic decisions rendered by the Court stem from the  
35 justices’ concerns over policy content. The neo-Markist  
36 model assumes that the main challenge to the Court in  
37 a statutory override involves Congress’s thwarting of the  
38 justices’ preferred policy as embodied in the case out-  
39 come. Yet while this response may undermine the Court’s  
40 ideological preferences with respect to a specific statute,  
41 it arguably poses no meaningful threat to the Court’s in-  
42 stitutional resources or status. Indeed, in some statutory  
43 cases, the Court goes so far as to invite legislative override  
44 (Haussegger and Baum 1999), although this invitation  
45 might actually be made to achieve the justices’ policy  
46 preferences (Spiller and Tiller 1996).

47 In contrast, in constitutional cases, a greater balance  
48 might be struck between the justices’ concerns for policy  
49 outcomes and their concerns for institutional mainte-  
50 nance. The exercise of judicial review obviously involves a  
51 direct challenge to the constitutional propriety of a legisla-

52 tive enactment. Members of Congress are therefore likely  
53 to perceive a Court decision invalidating federal legisla-  
tion as a direct threat to their own institutional authority,  
especially when the Court is ideologically distant from  
Congress. Thus while the justices are likely to be guided by  
their policy preferences in the choice to invalidate federal  
legislation (see Lindquist and Spill 2007; Segal and Spaeth  
2002), they may also be sensitive to Congressional reac-  
tion to their decisions. Because Congress (in conjunction  
with the president) may affect the Court’s institutional  
resources and power via the various mechanisms dis-  
cussed above, in constitutional cases the Court has more  
to fear from Congress with respect to its institutional au-  
thority. Most observers assume that the public’s diffuse  
support for the Court is likely to reduce the justices’ con-  
cerns over institutional maintenance. This observation  
suffers from a logical flaw, however, if the Court’s stand-  
ing is preserved through institutional maintenance via  
strategic exercise of the power of judicial review. If true,  
constrained behavior may in fact be easier to find in the  
context of judicial review than in statutory cases.<sup>5</sup> As Ep-  
stein, Knight, and Martin note in assessing constraints on  
the Court in constitutional and statutory cases, “[i]n fact,  
we might go so far as to argue that the Justices feel more  
compelled in constitutional cases than in statutory ones  
to take into account the preferences and likely actions of  
the relevant actors” (2001, 596). Successful Congressional  
retaliation in the constitutional context may remove the  
Court from the policy game entirely and may “irrevocably”  
damage the Court’s institutional legitimacy and  
standing, thereby “imposing a potentially infinite cost to  
the [Court]” (599–600). And their analysis supports the  
proposition that SOP constraints operate effectively even  
in constitutional cases.

## 54 Finding Evidence of a Constrained 55 Court

Given the theoretical and substantive importance of the  
issue, we propose a systematic test of Congressional influ-  
ence in cases in which the constitutionality of a federal law  
is challenged before the Court. Our model moves beyond

<sup>5</sup>We note that the distinction between rational anticipation and institutional maintenance has not been made by any researcher in the context of statutory cases, although the rational anticipation model has been tested specifically in Segal (1997). Based on the forgoing discussion, we have theoretical reasons to believe that institutional maintenance may be more relevant in constitutional cases, but make no claims in this manuscript about the applicability of that theory to statutory cases, which we leave to future research.

the Lindquist and Spill (2007) test of whether the preferences of the sitting Congress constrain the Court. Instead, we use Common Space (CS) scores, which are comparable across institutions and across time,<sup>6</sup> to create a more nuanced measure of Congressional preferences that specifically reflects the sitting Congress's preferences regarding the Congressional enactment at issue, even where that statute was enacted many years in the past. This allows us to estimate the probability that the sitting Congress would approve the Court's decision, an estimation that reflects the same type of assessment that the Court would have to make in order to rationally anticipate Congressional reaction. Of course, the Court will have its own preferences over the legislation as well, preferences that we can capture using Judicial Common Space (JCS) Scores (Epstein et al. 2007). These scores place the Martin and Quinn (2002) ideal point estimates into the Common Space.<sup>7</sup> They thus allow us to test not only the Court's preferences over the law, but the Court's distance from Congress. As that distance increases, a Court concerned with institutional maintenance might trim its sails. These advances in measurement render our test for legislative constraint more rigorous than analyses conducted in existing research.

Our ultimate goal in this paper is to test a model that examines whether the Supreme Court strikes the legislation before it based on (1) the expected preferences of the sitting Congress toward the law (the rational anticipation model), and (2) the preference configuration of the Court vis-à-vis the House and Senate (the institutional maintenance model).

With respect to the rational anticipation model, Congress's ability to respond to Court decisions with specific legislation designed to substantively override or otherwise undermine the judicial ruling is effectively determined by certain pivotal players in the legislative process. These include the chamber median in the House and the filibuster pivot in the Senate.<sup>8</sup>

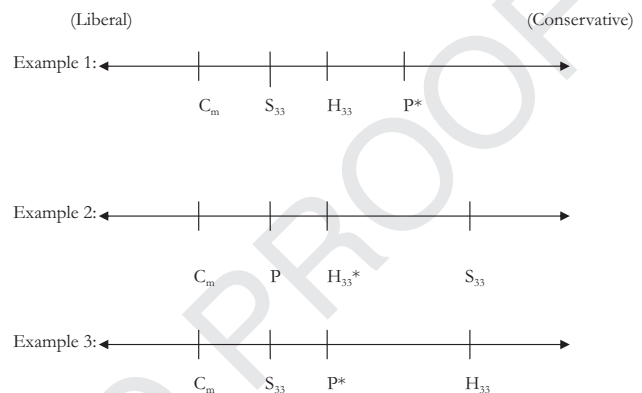
Presidential veto further complicates the game. Consider again override legislation favored by conservatives. Ignoring for now the possibility of a filibuster, the Court can withstand legislative override if it has the support of (1) the House median, or (2) the Senate median, or (3) the

<sup>6</sup>See Poole (1998, 2005), McCarty and Poole (1995), and Poole and Rosenthal (1997).

<sup>7</sup>See the Supporting Information for further details on using these measures.

<sup>8</sup>For our running example of override laws favored by conservatives, that would currently be the 40<sup>th</sup> percentile senator, with the 99<sup>th</sup> percentile being the most conservative.

**FIGURE 2 Spatial Representation of the Veto Game**



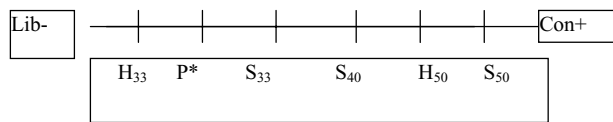
Key:  $H_{33}$  = House 33<sup>rd</sup> percentile,  $S_{33}$  = Senate 33<sup>rd</sup> percentile,  $P$  = President and  $C_m$  = Court Median. In all Figures, the President is to the left of the House and Senate Medians. \* = pivot.

president and either the 33<sup>rd</sup> percentile House member or the 33<sup>rd</sup> percentile Senate member.

Figure 2 examines the veto game in more detail. Again, the Court has made a liberal decision that conservatives would like to override. The override bill corresponds to a cut-point, such that those to the right of the cut-point prefer to override the Court while those to the left of the cut-point would vote against the override legislation. If the President is to the right of either chamber median, the pivot is the left-most of the two chamber medians, as in Figure 1. If the president is to the left of both chamber medians, but to the right of the 33<sup>rd</sup> percentile House and Senate members as in Figure 2, Example 1, the pivot is the President. If he supports overturning the Court, the Court's decision will be overturned. If the President is to the left of both 33<sup>rd</sup> percentile members, as in Example 2, then the pivot is the further left of the two 33<sup>rd</sup> percentile members. If that member supports overturning the Court, Congress could override a presidential veto of such legislation. Finally, if President is between the two 33<sup>rd</sup> percentile members, as in Example 3, then the pivot is once again the President. If he does not support the override legislation, his veto would be sustained by the 33<sup>rd</sup> percentile member to his left. If he does support override legislation, the bill would pass with his signature.

More fully, and with the possibility of filibusters, consider the configuration of preferences in Figure 3. If the cutpoint is to the right of  $S_{50}$ , then no relevant players support override and the bill passes neither chamber. If the cutpoint is to the left of  $H_{50}$  but the right of  $S_{40}$ , the bill could pass both chambers but gets blocked by a filibuster in the Senate. If the cutpoint is to the left of  $S_{40}$ ,

FIGURE 3 Potential Pivotal Players



H = House, P = President, S = Senate. Subscripts = percentile.  
 \* = pivotal player. + = more likely to support override; - = less likely.

but to the right of the President, the President vetoes the bill. The veto override fails because H<sub>33</sub> does not support overriding the veto. Thus, in Figure 3's configuration, the President is the pivotal player. If the president is willing to sign the bill, it would also be favored by the Senate filibuster pivot and the House median, so it would become law.

These models can readily add gatekeepers to the model. Gatekeepers are players, such as committees, whose assent might be necessary for the legislation to come to the floor for a vote. Political scientists have not converged on an answer as to whether or not gatekeeping authority actually exists (Crombez, Groseclose, and Krehbiel 2006), no less who has such powers. Shepsle and Weingast (1987) assert the presence of gatekeeping authority and place it in the hands of committees. Cox and McCubbins (2005), on the other hand, place gatekeeping authority in the hands of the majority party caucus.

What matters to the Marksist model, though, is not who really controls the legislative process, but whom the Court believes controls the legislative process. As there is no apparent way of knowing this, many scholars have tried testing a set of plausible models hoping that the results are robust to legislative specification (Bergara, Richman, and Spiller 2003; Segal 1997; Spiller and Gely 1992). We follow that lead by examining four different lawmaking models: a Floor Median model, a Filibuster model, a Party Gatekeeping model, and a Committee Gatekeeping model. Each model includes potential veto by the President and override by the respective chambers.

While the rational anticipation model requires careful consideration of lawmakers' preferences relative to the Act under review, the institutional maintenance model requires that consideration be given to the distances between the Court and relevant lawmakers. While we believe that the Court is most likely constrained by its distance from the centers of the two legislative chambers, members of the Court may also situate themselves in ideological space relative to the President and even to the Judiciary Committees, whose members are likely to be most attuned to Court decisions.

## Calculating Preferences over Challenged Legislation

The first task is determining the expected preferences of the relevant political actors toward the law being reviewed. Poole's Common Space scores scale Congressional preferences along a common dimension, which allows for direct comparisons over time between the president, the House, and the Senate. This allows us to estimate current Congressional preferences. To be sure, cases may exist in which across-time comparisons of legislative preferences are problematic. Common-Space conservatives in 2005 would probably support civil rights measures that Common-Space conservatives opposed in the 1950s. Nevertheless, we note that the entire purpose of Common Space scores is to provide measures that are directly comparable across time, and the robustness of these scores has been well demonstrated (Poole and Rosenthal 1997).

Thus, using the best available measure of over-time legislative preferences, we estimate contemporary support for each piece of challenged legislation by running logistic regressions on the original roll-call votes with support for the bill on the left-hand side and the then-Member of Congress's (MC) Common Space score on the right-hand side. We then use the coefficients from these equations along with each sitting legislator's Common Space scores to estimate each sitting legislator's preferences with respect to the challenged enactment at the time of the Supreme Court's decision. This procedure enables us to calculate the relative propensity of members of the House and Senate to vote in support of the law challenged before the Supreme Court, including those members relevant to our pivotal models: the members who represent the House and Senate floor and majority party medians, the House and Senate members who represent the veto override pivots, and the Senate member who represents the filibuster pivot. In addition, we calculated the propensity of the median member of the House and Senate Judiciary Committees to support the challenged law.<sup>9</sup> We used the President's Common Space score to estimate his preferences over the statute in question, using the same equation we use to predict Congressional preferences for the same law.

<sup>9</sup>In this connection we considered two possible sets of committees: (1) the Senate and House Judiciary Committees (see Ferejohn and Shipan 1990; Segal 1997), and (2) the individual substantive committees associated with each challenged enactment. Because the data were limited with respect to the second category—with some ambiguity about which committees considered which bills in a meaningful percentage of our cases—we focused our attention on the Judiciary Committees.

## Models of Rational Override Anticipation

**Floor Median Model.** To account for relevant pivotal players in the legislative process, we begin with a model of Congressional response based on the preferences of the floor median in each chamber (Column 1 in Table 1). This “Floor Median Model” evaluates the Court’s propensity to strike the statute in light of the probability that the relevant pivots, taken from the set of chamber medians, the President, and veto-override players, would support overturning the Court’s decision. This model therefore assumes that the median justice rationally anticipates the preferences of the likely pivotal player over the challenged legislation at the time of the Court’s decision.

**Senate Filibuster Model.** In the Senate Filibuster model and in our subsequent models, we incorporate consideration of the Senate member who represents the filibuster point, which constitutes (prior to 1975) the 60<sup>th</sup> most liberal or conservative Senator depending on the liberalism of the law at issue and (after 1975) the 67<sup>th</sup> most liberal or conservative Senator depending on the liberalism of the law at issue. In our Senate Filibuster Veto model (Column 2 in Table 1), therefore, the variable Predicted Support of Pivot would take on the value of the propensity of that pivotal player to reenact the challenged legislation.

**Gatekeeping Models.** The two gatekeeping models follow the same logic, but simply incorporate (alternatively) the preferences of the relevant gatekeepers (House and

**TABLE 1 The Effect of the Court’s Preferences, Congressional Preferences, Institutional Maintenance Measures, and Control Variables on the Likelihood That Supreme Court Will Strike Federal Legislation**

Category	Variable	Floor Median Model	Senate Filibuster Model	Party Gatekeeper Model	Committee Gatekeeper Model
Rational Override Anticipation	Predicted Support of Pivot	3.233 (1.452)	4.135 (1.537)	3.300 (1.571)	2.690 (1.465)
Institutional Maintenance	Floor Median Distance from Court	−9.083*** (2.790)	−11.224*** (3.281)	−10.402*** (3.082)	−10.078*** (2.999)
	President’s Distance from Court	−4.088*** (1.393)	−4.605*** (1.397)	−4.333*** (1.417)	−4.162** (1.415)
	House Jud. Chair Distance from Ct.	−3.342** (1.361)	−3.589** (1.382)	−3.668** (1.386)	−3.251** (1.363)
	Senate Jud. Chair Distance from Ct.	−3.643** (1.367)	−3.800** (1.406)	−3.755** (1.423)	−3.656* (1.412)
	Number of Court Curbing Bills Introduced	−0.037 (0.024)	−0.042* (0.025)	−0.038 (0.025)	−0.037 (0.025)
Justices’ Preferences	Predicted Support by S. Ct.	−4.538** (1.779)	−5.474** (1.842)	−4.769** (1.946)	−4.104** (1.855)
Controls	Solicitor Support	−0.323 (0.605)	−0.271 (0.601)	−0.321 (0.598)	−0.226 (0.603)
	Amicus Briefs in Favor of Law	−0.015 (0.063)	−0.011 (0.062)	−0.011 (0.061)	−0.023 (0.063)
	Amicus Briefs Opposing the Law	0.065 (0.071)	0.057 (0.074)	0.062 (0.073)	0.065 (0.075)
	Constant	5.815*** (1.586)	6.487*** (1.614)	6.430*** (1.675)	6.045*** (1.629)
	N	174	174	174	174
	Log-Likelihood	−81.1	−79.217	−79.708	−80.342
	% Correctly Predicted	77.0	77.6	79.3	78.7
	Chi-Square	33.09	33.38	30.83	30.98

The four models represent different assumptions about the relevant pivotal player. \*represents  $p < .05$ , \*\* $p < .01$ , \*\*\* $p < .001$  (one tailed tests). Standard errors are robust.

Senate Party Medians, and the median members of the House and Senate Judiciary Committees) into the model. Thus, the Party Median Gatekeeping Model (Column 3 in Table 1) accounts for the preferences of the House median, the Senator at the relevant filibuster point, the House and Senate majority party medians, and the president or other veto pivots. The Committee Gatekeeping Model (Column 4 in Table 1) accounts for the preferences of the House floor median, the Senator at the relevant filibuster point, the House and Senate Judiciary Committee medians, and the president or other veto pivots. In these models, the variable Predicted Support of Pivot reflects the preferences of the pivotal player at the time of the Court's decision, taking into consideration the relative ideological positions of these various actors in the law-making process.

### **Institutional Maintenance Model: Court Distance from Key Legislators and the President**

In addition to these predictions regarding specific support for the legislation at issue—which stem from the rational anticipation model—we also constructed measures of constraint based on the proximity of the median justices' ideology to those of the median members of the sitting Congress. For purposes of this more general measure of constraint on the Court, existing institutional maintenance models suggest that the Court will be constrained in constitutional cases when its preferences deviate substantially from Congressional preferences. To test for this proposition, we created a variable reflecting two alternative regimes: (1) situations in which the Court's ideal point falls at or between the median preferences of the House and Senate, and (2) situations in which the Court's ideal point falls outside those medians, i.e., where the Court is either more conservative or liberal than each chamber.

To measure how these alternative conditions affect the Court, we created a variable coded as zero in situations in which the Court's ideal point falls between that of the median of the two chambers (regime 1). Regime 1 reflects the situation in which the Court may act unconstrained by Congressional preferences. When the Court's ideal point falls outside those medians, it faces a constrained optimization problem. Those constraints will become more significant the farther away the Court is from the House or Senate, depending on which chamber is closer to the Court. For that reason, Regime 2 is coded as the distance between the median justice's Common Space score and the Common Space score for the median

member of the closest chamber of Congress. The regime variable, Floor Median Distance from Court, thus takes the value of 0 under Regime 1, and a continuous value representing ideological distance between Congress and the Court under Regime 2.

We also calculated measures reflecting the absolute value of the ideological distance between the median member of the Court and both the Judiciary committee chairs (House/Senate Judiciary Chair Distance from Court). From the institutional maintenance perspective, relevant players on the judiciary committees potentially have the ability to attack a divergent Court. Although we formulate our approach primarily in terms of Congressional influence over judicial outcomes, Congress generally cannot act alone in disciplining the Court; the President is also potentially a relevant actor in the Court's strategic calculations (Predicted Support by President). We also created a measure of the ideological distance between the President and the Court by calculating the distance between the President's Common Space score and the median justice's Judicial Common Space score (President's Distance from Court).

Finally, the institutional maintenance model focuses on Congressional hostility to the Court as an institution under political conditions that disfavor the Court. In addition to the Court's distance from the relevant actors in Congress and the executive, another measure of the political climate involves legislation introduced in Congress to curb the Court's authority (Clark 2009). Tom Clark has demonstrated that the introduction of court-curbing legislation serves to constrain the Court because it threatens the Court's legitimacy—reflecting the central tenet of our institutional maintenance model. To assess this effect, we therefore incorporated into our models a variable reflecting the number of court-curbing bills introduced per year.<sup>10</sup>

### **Judicial Preferences Regarding the Challenged Legislation**

In addition to the measures described above—which enable us to evaluate the extent to which Congressional preferences may constrain the Court's behavior in the exercise of judicial review—we must also account for the justices' ideological response to the challenged enactment. Various methods are available to measure the justices' attitudinal reaction to an enactment, including the simple direction of the statute at issue based on the directionality coding

<sup>10</sup>We thank Tom Clark for generously providing the data on Court-curbing legislation.

scheme in the United States Supreme Court Database (see Lindquist and Spill 2007). Rather than rely on the Spaeth Database, we created a measure of the median justices' preferences over the enacted legislation using the Judicial Common Space (JCS). Because the JCS Scores reflect the mapping of the justices' ideal points into Poole's Common Space, it is possible to predict the justices' preferences using the same logit equations relied upon to predict the sitting Congress's preferences regarding the challenged legislation. We used the predicted probability of support for the median justice on the Court to measure its ideological response to the enactment (Predicted Support by Supreme Court).

Several variables serve as controls in our models. First, although the Solicitor General appears in support of the challenged enactments in the vast majority of cases in our database, in a small minority of cases the Solicitor did not appear (the case was litigated by private parties). Thus, we created a variable reflecting whether the Solicitor supported the statute (Solicitor Support). We include this variable as a control because of the ample evidence that demonstrates the importance of the Solicitor as a persuasive litigant before the Court, whether because the Solicitor is an able advocate, has unique credibility, selects the best cases, or provides important signals to the justices about the President's policy preferences (Bailey, Kamoie, and Maltzman 2005; Pacelle 2003). And although we test for the influence of the President on the Court's decision making using direct measures of presidential preferences, the role of the Solicitor in expressing those preferences cannot be ignored. We also expect that the Court might be influenced by outside interests that support or oppose the legislation. We thus included two variables measuring the number of amicus curiae briefs in support of upholding the challenged legislation and opposed to the legislation filed in the case (Amicus Brief Support, Amicus Brief Opposed). Amicus briefs may provide an indirect measure of public opinion as expressed through organizations interested in the particular case outcome; research has demonstrated that these briefs can have an important impact on the justices' voting behavior (Collins 2009). Because it is possible that the Court's constitutional decisions may be affected by this form of interest group pressure, we included two measures to control for that possibility.

## Data and Methods

Using the Spaeth database, we identified all Supreme Court decisions from 1954 to 2004 in which petitioners challenged the constitutionality of federal legislation.

We started with all cases in which Spaeth identified judicial review at the national level as the source of authority for the Court's decision.<sup>11</sup> From this initial list of cases, we separated out cases challenging an executive or agency decision, keeping only those that challenged Congressional laws. This yielded a dataset of 174 cases, with the law struck in 47 cases and upheld in 127.<sup>12</sup>

We used the roll call data associated with Poole's Common Space scores, which are directly comparable across time and between chambers of Congress, to estimate the probability that any member of Congress supported the legislation given his or her Common Space score. That is, after identifying the roll-call vote on the challenged piece of legislation, we ran logistic regressions with support for the bill on the left hand side and the Member of Congress's Common Space score on the right hand side. In these equations, we rely on the first dimension Common Space scores. Not only is there strong evidence that most roll call decisions can be explained by a single dimension, but the explanatory power of the first dimension is increasing over time (Poole and Rosenthal 1997). The first dimension in all of the various forms of the NOMINATE scores maps along the traditional liberal-conservative lines, which is also an appropriate characterization of Supreme Court preferences (Grofman and Brazil 2002; Martin and Quinn 2002). We used the logistic regressions to determine the expected preferences of the pivotal member of the Congress sitting when the Court reviews the legislation at issue.<sup>13</sup> In the same way, we applied the Judicial Common Space scores to determine the preferences of the Court about the legislation at hand.

Using logit regression with robust standard errors, we then estimate the likelihood that the Court will strike the law based on (1) the Court's preferences regarding the challenged legislation, (2) the preferences of the pivotal lawmaker regarding the challenged legislation for each of our lawmaking models, (3) the relative position of the Court's ideal point to that of the Senate and House (the Floor Median distance), (4) the relative position of the Court's ideal point to that of the Senate and House Judiciary Committee chairs, (5) the distance between the President's ideal point and the Court's ideal point, (6) the

<sup>11</sup>In the Spaeth database, this is all cases in which the authority of the decision (auth\_dec1 or auth\_dec2) equals 1.

<sup>12</sup>Given the scaling procedure employed in the analysis, challenged laws that were passed unanimously or with voice votes in both the House and the Senate cannot be included in the analysis. The logit equation used to predict contemporary Congressional, judicial, and executive preferences can only be estimated if there is variance in the original roll-call vote.

<sup>13</sup>To determine whether a bill was "conservative" or "liberal" for purposes of identifying the relevant veto points, we used the direction of the coefficient in the logit model of the bill's passage.

2 number of court-curbing bills introduced in Congress in  
 3 each year; (7) the number of supporting and opposing  
 4 amicus briefs, and (8) whether or not the solicitor gen-  
 5 eral supports upholding the legislation. We present the  
 6 results of those models in Table 1 below. Because each  
 7 of our hypotheses is clearly directional—with the depen-  
 8 dent variable being the Court striking the law, all coeffi-  
 9 cients except those for “Amicus Briefs Opposing the Law”  
 10 should be negative—we present the results from one-tail  
 11 significance tests.

## 14 Results

16 The results in Table 1 present an interesting and consistent  
 17 set of inferences. First, regardless of how we model the  
 18 pivotal player in the legislative process, the implications  
 19 of our analysis are the same. The only differences across  
 20 the models are the respective model fits. We find that the  
 21 Senate Filibuster model fits the data the best.<sup>14</sup> As a result,  
 22 we interpret only the effects of the Senate Filibuster Model  
 23 (Column 2) below.

25 The justices’ preferences are, as expected, a signifi-  
 26 cant predictor of the Court’s decisions in these cases. As  
 27 the Court’s ideological congruence with the legislation in-  
 28 creases, the likelihood of the invalidation decreases. This  
 29 variable has a large substantive impact. Holding other  
 30 variables at their mean, if the Court’s ideological congru-  
 31 ence with a law is set at its minimum value, i.e., when a  
 32 very liberal court considers a law passed by a conserva-  
 33 tive Congressional majority, the probability of the Court  
 34 striking the law is about 93%.<sup>15</sup> On the other hand, when  
 35 the ideological congruence is at its maximum, such as  
 36 a very liberal court considering a law passed by a lib-  
 37 eral Congressional majority, the probability of the Court  
 38 striking the law falls drastically to 7%.<sup>16</sup>

41 <sup>14</sup>Using the BIC as a model fit statistic, the models are in  
 42 order of best to worst fit: Senate Filibuster (−682.492), Party Pivot  
 43 (−681.511), Committee Gatekeeper (−680.242), and Floor Me-  
 44 dian (−678.726). Raftery (1995) argues that differences of less than  
 45 2 points should be considered “weak” support for the model with  
 46 the lowest score, while differences of 2 to 5 points should be con-  
 47 sidered positive support. In our analysis, the Floor Median model  
 48 clearly performs worse than the other three models of legislative  
 49 decision making, and the Senate Filibuster model is only weakly  
 50 better than the Party Pivot model. We interpret the findings from  
 51 the Senate Filibuster model, but the key substantive interpretations  
 52 hold across all models unless otherwise noted.

53 <sup>15</sup>All predicted probabilities, confidence intervals, and values in the  
 following graphs were computing using the *spost* package in Stata  
 10. The bootstrapped 95% confidence interval is [.47, .99].

<sup>16</sup>The bootstrapped 95% confidence interval is [.01, .15].

Besides the substantive and theoretical importance of  
 this finding, the results also confirm the viability of our  
 measurement strategy. That we can predict the Court’s  
 support for a law based on the Common Space scores  
 of those legislators who originally voted for it suggests  
 that we have in fact reliably measured preferences both  
 over time and across institutions. One objection to our  
 approach might be that the Court may only be addressing  
 a small portion of the legislation and not the bill as a  
 whole. If those piecemeal challenges do not reflect the  
 overall policy orientation of the legislation, then we would  
 not find such strong evidence of the effect of the Court’s  
 preferences.

While the Court’s own preferences clearly matter, the  
 results indicate that the Court’s strategic calculations re-  
 garding a legislative response does not extend to a nuanced  
 evaluation of the likelihood that the sitting Congress and  
 President will overturn the Court’s decision. The variable  
 measuring the predicted support of the pivotal law maker  
 does not achieve conventional levels of statistical signif-  
 icance, and the sign on the coefficient is in the wrong  
 direction. As a robustness check, we estimated a model  
 with only the preferences of the Court and the relevant  
 pivotal lawmaker, and this did not yield a substantively  
 different results. As demonstrated in Table 2, the pivotal  
 player’s preferences were again statistically insignificant  
 and incorrectly signed.

Yet the data do suggest that the Court may be re-  
 sponsive to a more general assessment of the political  
 conditions under which it is operating; in particular, the  
 Court appears to attend to its own ideological position  
 vis-à-vis the median member of each chamber, the medi-  
 ans of the Judiciary Committee, and the President. When  
 the Court’s median ideological position falls between the  
 ideological position of the median member of the House  
 and Senate, the Court is more likely to invalidate legisla-  
 tion, controlling of course for the Court’s own preferences  
 over that legislation. As the distance between the Court’s  
 median and the closest chamber of Congress increases,  
 it becomes significantly less likely to do so. This finding  
 suggests that the Court is sensitive to the potential for in-  
 stitutional retaliation from members of Congress whose  
 preferences are at odds with the Court’s.

Figure 4 illustrates the impact of the Court’s own  
 preferences (between-line variation) and the distance be-  
 tween the Court and the closest Congressional chamber  
 (within line variation).<sup>17</sup> The figure clearly demonstrates  
 the role of both the Court’s preferences and the Court’s  
 distance from Congress. Comparing between lines, if the

<sup>17</sup>We calculate probabilities holding the rest of the values in the  
 model at their means.

**TABLE 2 The Effect of Only the Court's Preferences and the Relevant Pivotal Player on the Likelihood that Supreme Court Will Strike Federal Legislation**

Category	Variable	Floor Median Model	Senate Filibuster Model	Party Gatekeeper Model	Committee Gatekeeper Model
Rational Override Anticipation	Predicted Support of Pivot	1.701 (1.030)	1.020 (0.856)	1.074 (0.840)	1.115 (0.766)
Justices' Preferences	Predicted Support by S. Ct.	-2.267* (1.242)	-1.637 (1.066)	-1.680 (1.075)	-1.685* (1.037)
	Constant	-0.454 (0.679)	-0.449 (0.684)	-0.428 (1.562)	-0.417 (1.504)
	N	174	174	174	174
	Log-Likelihood	-100.113	-100.627	-100.403	-100.139
	Chi-Square	3.55	2.46	2.61	3.05

\*represents  $p < .05$ , \*\* $p < .01$  (one tailed tests). Standard errors are robust.

Q1 FIGURE 4

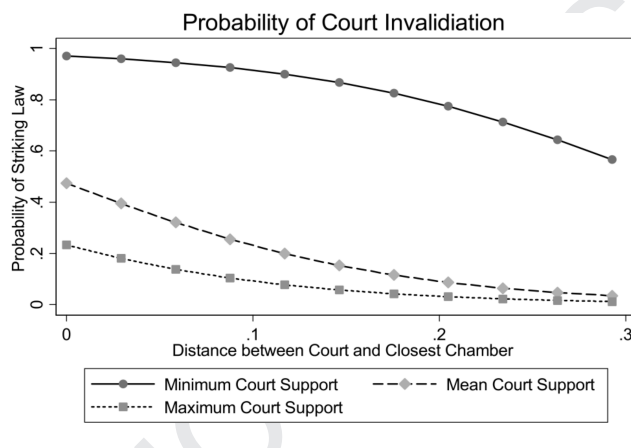
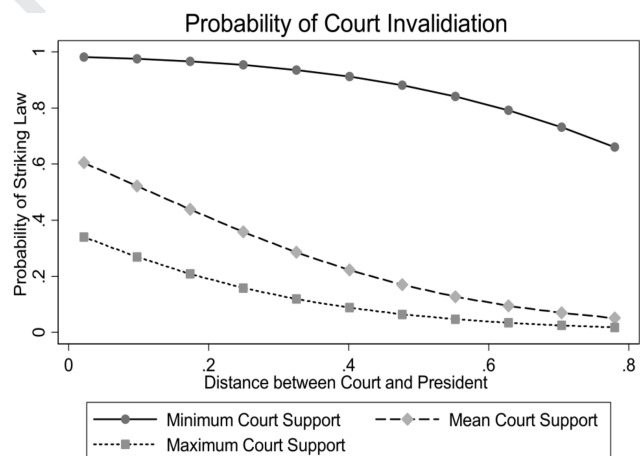


FIGURE 5



Court is ideologically opposed to the law, it is highly likely to strike it (top line), overwhelmingly so when it is between the two chambers (left end of the line), but substantially so even when it is at the maximum distance from the closest chamber. Given mean (and lower) levels of Court ideological opposition to the legislation, the Court is unlikely to strike the law, and not surprisingly, becomes less inclined to strike as the distance between the Court and the closest chamber of Congress increases.

The variable reflecting the ideological distance between the President and the Court median is significant and negatively signed. Figure 5 presents the change in predicted support as distance between the Court and the President increases. Again, if the Court is strongly opposed to the legislation, the model predicts the Court will still be predicted to strike the law, but the probability de-

creases as ideological distance between the President and the Court increases. Holding the support of the Supreme Court and all of the other variables at their mean values, the predicted probability of the Court striking legislation is reduced by 57% as the distance between the Court and the President moves from its minimum to its maximum value. While the Figures 4 and 5 look similar, the scale of the x-axis differs substantially. We observe much larger distances between the Court and the President than we do for the Court and the nearest chamber median.

The distances from the House and Senate Judiciary Chairs further support the hypothesis that the Court responds to its institutional position relative to the elected branches in terms of its ideological distance from them. With all other variables held at their mean values, the

probability of striking legislation is reduced by 39% as the Court moves from the minimum distance to the maximum distance from the Chair of the Senate Judiciary Committee; this reduction is 28% for the Chair of the House Judiciary Committee. The significant negative effect of the committee distances fits nicely within the boundedly rational institutional maintenance model. The chairs of these committees are not only highly visible, but any Congressional attempt to attack an ideologically distant Court will certainly go through the Judiciary Committees.

The variable measuring court-curbing legislation also achieves statistical significance in the Senate filibuster model, providing further support for a theory of institutional maintenance: the more court-curbing bills that are introduced in Congress, the less likely the Court is to invalidate a federal enactment. The likelihood of striking legislation is reduced by 6% as the number of introduced bills goes from 0 to the observed mean (about nine bills) and is reduced by 22% if the maximum number of bills (53) is observed.<sup>18</sup> In combination with the distance measures discussed above, this variable's significance provides additional emphasis on the Court's concern for institutional maintenance over its concern for specific policy outcomes. At the very least, it indicates the justices' sensitivity to the political conditions the Court faces as it renders constitutional judgments.

Other variables in the model are not significant. Neither of the amicus brief variables is significant, nor is Solicitor General support. These insignificant results suggest that, in the context of judicial review of federal enactments, the Court takes its cues less from the specific signals sent by the Solicitor's General or interest groups. Rather, the Court is influenced by its more general position vis-à-vis the elected branches. It is also possible that in the context of judicial review of federal enactments, interest groups are equally and well mobilized on both sides of the debate and that the Solicitor is almost always involved, such that these variables might be expected to have a limited impact in any event.

In sum, our results are highly robust. Regardless of the model of the legislative process, we find that the Court responds consistently with our institutional-maintenance model, but does not appear to rationally anticipate override in the instant case.

<sup>18</sup>We tried several variations for this measure. We used the number of bills reported out of committee in addition to the number of total bills, we used one-period lags, and we used the transformation in Clark (2009). The reported bills only, lagged measures, and transformed measures never approach levels of conventional significance.

## Discussion

This research addresses questions of primary importance to public law scholars and political scientists as a whole. Because it provides the first systematic, large-N study that accounts for both enacting and sitting legislative and Presidential preferences, as well as the preferences of the Court over the challenged legislation, this study provides a much needed empirical basis to assess the long standing debates over the role of the Supreme Court as a countermajoritarian institution. Addressing the question whether the Court defers to Congress (or the President) in constitutional cases allows for a richer and empirically grounded understanding of how the Court operates within a system of separated powers.

Exactly what shifts in the political environment should lead to changes in the behavior of the Court is not entirely clear, however, for the constraints faced by the Court depend crucially on who has control over the legislative process in Congress. But what really matters for our model is not who actually has control over the legislative process, but whom the Court perceives has control over the legislative process. We, of course, do not know this, but we can and have tested our hypotheses over a variety of different models with consistent results. Moreover, the Court also decides cases in an uncertain political environment. The Court itself would be unlikely to know whether Congress would overturn or retaliate based on any particular constitutional decision (cf. Epstein, Knight, and Martin 2001, 591). Rather, we expect the Court to take cues from the likely preferences of Congress and the President. In this analysis, our expectations were borne out: the Court does not appear to engage in precise calculations regarding likely Congressional or presidential support for the law at issue. Rather, the Court appears instead to take its cue from the more general preferences of the sitting Congress and President. Thus the Court's decisions in cases involving judicial review depend not on the likely response to its decisions from a specific policy perspective but rather on the political conditions facing the Court more broadly. By controlling for the case-level rational anticipation model, we are able to distinguish between these two factors motivating the justices' behavior; the influence of court-curbing bills lends additional credence to this approach.

That the Court is less sensitive to likely Congressional or Presidential reactions to specific legislation and more sensitive to its relative ideological position to Congress and the President may also provide support for the notion that, in constitutional cases, the Court is more concerned with institutional maintenance than it is with specific

policy outcomes per se. In Murphy's words, the Court is willing to fight battles over constitutional meaning, but is more inclined to do so under political conditions favorable to the Court rather than on a case-by-case policy-driven basis "whenever an individual litigant chooses to challenge the validity of a statute" (1964, 157). Thus while the Court's policy preferences continue to exercise an influence over its exercise of judicial review, the justices also appear to moderate the use of this power depending on whether their ideological preferences are inconsistent with those of sitting members of Congress. Under those conditions, the Court may anticipate adverse reactions from Congress that could threaten the judiciary's institutional status, even if the justices do not make calculations regarding Congress's likely response in terms of the precise policy outcome at stake.

These findings are also consistent with the theory of regime politics advanced by Whittington (2005) and others (e.g., Gillman 2002). This theory posits that the Supreme Court's exercise of judicial review does not always involve a confrontation between a wayward Court and an unwilling Congress. Rather, judicial review may be exercised by a friendly Court in such a way as to advance the policy preferences of the elected branches. By "interposing a friendly hand," the Court may invalidate enactments passed by previous legislative coalitions so as to promote the interests of the sitting Congress. This perspective also conforms well to Dahl's seminal work (1957) suggesting that the Court is more likely to strike legislation enacted by previous majorities and uphold legislation enacted by the current regime. Here we show that the Court acts most aggressively when its members' preferences conform to the dominant preferences in the two chambers and in the Presidency. Although we do not test directly whether the statutory invalidations during unconstrained periods actually further the policy objectives of those sitting in the legislature at the time decisions are rendered, other research has shown that the Court tends to uphold statutes that conform to the dominant preferences in Congress and strike those that do not (Lindquist and Solberg 2007). Moreover, to the extent that the Court is responsive to public opinion (Marshall 1989, 2008), one might expect that its decisions would be constrained by the political configuration within the elected branches. In combination with existing studies (including, e.g., Epstein and Knight 1992), therefore, our analysis helps complete the empirical portrait of a constrained Court in the unique context of constitutional review.

From the standpoint of countermajoritarianism, finally, the results presented here paint a portrait of the justices as savvy strategic actors who are more willing to assert their collective policy preferences when their institution is insulated politically from potential institutional

retaliation by the elected branches. In 1997, Segal demonstrated that the justices are not constrained by any rational anticipation of Congressional reaction to their decisions involving statutory interpretation. Apparently the same is true with respect to constitutional decisions, but with a twist: while the Court may not rationally anticipate other political actors' responses to specific decisions, it does appear to recognize its broader institutional position vis-à-vis the elected branches and modify its decisions accordingly. We have advanced the theory that it does so less from concern over specific policy pronouncements that counter its own ideological preferences than from concern over the Court's institutional vulnerability and authority.

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## Query

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