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LAW AND DISORDER: WHY DOES THE SUPREME COURT CHALLENGE AND
INVALIDATE FEDERAL LAWS?

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ABSTRACT

It only takes the votes of five unelected justices on the Supreme Court to invalidate a federal law passed by hundreds of elected members of Congress. The Court's ability to challenge and potentially rule federal laws unconstitutional is formally called judicial review. This paper is concerned with examining judicial review and determining what attributes of laws encourage justices to use this power. After running logit regressions testing my hypotheses, my results suggest the following: 1) the more votes a law receives at its passage, the more likely that law will be both challenged and invalidated; 2) the more support a law has from the current Congress at the time of potential challenge, the less likely that law will be both challenged and invalidated; 3) as the age of the law increases, the likelihood of that law being challenged increases; 4) the type of government (unified or divided) that passes a law has no effect on whether or not that law will be challenged or invalidated; 5) once laws are challenged, there is little telling of whether or not they will be invalidated. The implications of these results demonstrate that congressional preferences play a strong role in influencing judicial decisions, and the law's age is a very important factor in determining if or when the Court will address the constitutionality of a law as well.

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Chapter 1

Introduction

“Legislation is a living, breathing force in American politics. Laws enacted by the U.S. Congress, if entrenched, determine the boundaries of the political community, establish the rights and duties of citizens and officeholders, and provide the vehicle through which campaign promises, party platforms, and ideological programs are translated into policy outputs” (Jenkins and Patashnik, 2012, pg. 5). Laws passed by Congress have significant implications for all citizens, shaping the democratic society of the United States. But, in an instant, these seemingly powerful laws can become meaningless and obsolete when the majority of the Supreme Court Justices decide to strike them down. This ability for the Supreme Court to determine the constitutionality of an act of government is referred to as judicial review. This power extends to the Court trying and invalidating laws passed by both states and Congress, and also allows the Court to rule executive actions unconstitutional. It is this phenomenon of judicial review as it relates specifically to laws passed by Congress that this paper concerns.

Judicial review is a powerful ability originally established for the United States Supreme Court by the esteemed Chief Justice John Marshall in the landmark Supreme Court case, *Marbury v. Madison*, centuries ago. It is only used a handful of times each year by the Supreme Court, sometimes resulting in the invalidation of important legislation while in other instances only striking down marginally important laws. There is an abundance of literature that evaluates the factors that influence the use of judicial review by the Supreme Court. Previous studies have shown that the ideology of justices (Epstein and Martin, 2011), the party challenging the law

(McAtee and McGuire, 2007), and the amount of interest in the case (McAtee and McGuire, 2007) are just a few of the important factors that may determine whether or not a justice will strike down or uphold a piece of legislation. However, existing studies have overlooked other variables beyond these that might influence judicial behavior.

One key explanation that has not received prior attention in studying judicial review of federal laws is the attributes of the law specifically. There is a plethora of research solely focused on Supreme Court decision making in general, but surprisingly few studies actually evaluate the law that is being tried by the high court. Looking at the law specifically seems to be a worthwhile study, considering it would supplement previous Supreme Court decision making findings as well as shed light on information about the longevity and success of congressional laws. Because federal laws have been challenged and will continue to be in the future, this study can help with the prediction of future case outcomes, and also indicate possible decision making trends with regards to laws.

In my research I evaluate four major variables that I believe have a relationship in whether or not the law will avoid judicial review: the vote share the law receives at the time of passage, the estimated congressional support a law has at the time of potential review, the year the law was passed in relation to when the law is potentially tried, and the type of government that passes the law. I test whether these characteristics of the law will play a role in determining its fate in Court. I expect they might because of well-known theories established by the political science community. Because of the constitutional powers granted to Congress with regards to constraining the Court's jurisdiction and size as well as support suggesting the Court has similar opinions to Congress, I will rely on the literature supporting the Court as a majoritarian institution when crafting my hypotheses (Dahl, 1957; Hall and Ura, 2015; Uribe, Spriggs and

Hansford, 2014). Additionally, the studies that prove unified governments as being largely more productive with stronger and longer lasting legislative outputs than divided government will help to develop my own theories regarding the effect the type of government has on the longevity of federal laws (Shipan and Maltzman, 2008). Thus, my contribution to the scholarly community in the following paper is to answer the following questions: What characteristics of these laws make them more susceptible to Court scrutiny? Why are certain laws challenged and even overturned, but not others?

Congressmen and women as well as political scientists will benefit from the results of this study for a variety of reasons. In addition to the importance of this research as it applies to all citizens, this study additionally supplements current Supreme Court decision making literature. It goes further than looking at general ideological patterns, and targets a specific and important factor, the law, the Justice's consider when making decisions. For those aiming to predict outcomes of Court cases, this research could be useful when cases challenge congressional laws. Additionally, Congress can use the results of this study to help them determine the likelihood that their laws will either be challenged or alternatively remain untouched by the Court. Although it is out of individual Congressmen and women's control to determine whether Congress is unified or divided when the law is passed, Congress does influence the vote share and the support it has for a law at the time of potential review of a law, which are both things I predict will be important factors when Justices consider the law in question.

This research is incredibly valuable and important to citizens, government officials, and scholars interested in this topic. It has significant implications for citizens because federal laws are all encompassing and affect every single citizen on the United States. When federal laws are

overturned, changes are often made to our economic, political, or social life. Landmark laws generally affect a wide scope of people and are powerful in their implications, so when these laws in particular are invalidated, the effect is great.

Additionally, when judicial review is applied and carried out, the justices are going against the wishes of elected Congressmen, those of whom are voted for by people like you and me. The countermajoritarian nature of judicial review is apparent, and the opinions on its use and the outcomes of its application are often divisive and important. Judicial review has been lambasted as an, “inappropriate mode of final decision making in a free and democratic society” (Waldron, 2006, pg. 1348). This argument presenting judicial review as violating democratic principles is often at the heart of this fiery debate. Supreme Court justices are too concerned about specific doctrine and legal interpretation and fail to focus on the ethical, moral, or pragmatic considerations when applying judicial review to federal laws (Waldron, 2006). However, arguments in favor of the use of judicial review are not uncommon, often citing the necessity of separation of powers and checks and balances in the federal government for support (Rostow, 1952). The strongest argument supporting judicial review suggests that the Supreme Court is entirely independent of passionate interests, factions, interest groups, and lobbyists, passing judgment honestly and based purely on Constitutional guidelines. Regardless of the opinion one has on judicial review, it is clear that it has been and always will be a contested topic as the Court continues to use it to challenge and strike down important laws.

After reviewing the literature, developing unique hypotheses, and conducting research testing my hypotheses, I have come to many conclusions regarding federal laws in Supreme Court cases. First, the Court responds to the vote share a law receives, but the direction of this relationship is quite unusual. Vote share for a law is positively correlated to the application of

both judicial review and a law's invalidation. As a law receives more votes at the time of its passage, the likelihood of that law being challenged and invalidated also increases. The estimated congressional support a law receives is also significantly related to laws that are challenged and invalidated, but in the opposite direction as the previous variable. As estimated congressional support decreases, the likelihood of a law being both challenged and invalidated increases. Second, the age of the law is also significant. The younger the law is, the more likely the law will be challenged. This relationship holds for invalidated laws as well, but it is not significant enough to draw definite conclusions. The nature of government at the time of a law's passage has no effect on whether or not the Court will try and/or invalidate a law. Lastly, it is difficult to tell which laws will become invalidated once they are already challenged.

Chapter 2

Literature Review

Judicial Decision Making

The way in which Justices make their decisions is interesting, and this curiosity has led many political scientists hunting for the reasoning behind every judicial vote. Like any topic in the political science world, the consensus is mixed. However, some arguments tout more legitimacy and support than others, leading to general conclusions regarding the motivations of decision making. There are many schools of thought I wish to elaborate on that will aid in developing my theories and hypotheses. While some argue that justices vote based only on their personal preferences (Segal and Spaeth, 1993), others defend the notion that justices are strategic actors and make decisions based on many outside influences (Epstein and Knight, 1998). It is the latter of these arguments that I rely upon more heavily in crafting my theories and hypotheses.

With regards to judicial decision making, studies have proved that “justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others” (Epstein and Knight, 1998, pg. 2). This well respected analysis of Supreme Court decision making presents evidence that justices keep others in mind when casting their votes, and much scholarly research has proved that the legislative and executive branches of government are some of these “other” important influences (Epstein and Knight, 1998).

Segal’s (1997) famous separation-of-powers model examines Supreme Court decision making in the context of ideal policy points from members of Congress and the Supreme Court.

This model suggests that the Court votes considering the repercussions the judicial branch may face if its decision is far outside the median Congressmen's preferences. This model also shows that the Court does not hesitate in overturning legislation that is not strongly supported by Congress. The idea that the Supreme Court justices are strategic actors who consider the preferences of others is a well-founded and legitimate theory.

Given the political nature of the position, many scholars posit that the Court makes decisions largely based on personal preference and ideological considerations (Gibson, 1978; Pinello, 1999; Tate and Handberg, 1991). While numerous studies have attempted to argue for and against theories that suggests judges vote based on their preferences, Gibson's (1978) model examining this theory closely found that ideological preferences are an important factor in judicial decisions. However, Gibson also notes that it is rarely the only factor in the decision making process, and it is largely dependent on the judge reviewing the case (Gibson 1978). Additional research by Pinello (1999) examines literature and data from over 120 sources, ultimately arguing that ideological considerations are more present in federal courts than in state courts. Research studying Supreme Court decision making specifically found that partisanship, political factors, and the appointing president's intentions are all significant in voting decisions (Tate and Handberg, 1991). Overall, ideological preferences in judicial decision making are very often studied, providing a mixed bag of evidence but generally agreeing that ideology plays some role occasionally.

In addition to evaluating strategic and personal influences of judicial decision making, legal considerations are also very important to acknowledge, considering the judge's role is to ultimately interpret the law in relation to the Constitution. Some scholarly work proves that the justices engage "in careful legal analysis," which helps "mitigate against the advancement of

mere preferential or strategic considerations” when evaluating laws in the cert process (Gillman, 2001, pg. 491). This theory suggests legal considerations are the primary concern of judges, something one would expect to be true of all judges, but is not always the case.

Apart from legal, strategic, and preferential considerations, there are also theories that point to a plethora of minor factors that culminate together in influencing judicial decisions. These include the framing of the legal argument being presented to the Supreme Court (Epstein and Kobylka, 1992), the jurisprudential trends prevalent at the time (Cushman, 1998), the effect the decision will have on a judge’s reputation (Miceli and Cosgel, 1994), and the potential rewards or promotions the decision will merit (Shapiro and Levy, 1995). While most of these scholars admit to more than just these specific factors playing a role in swaying judicial decisions, it is important to take into account the large number of influences scholars have identified when trying to explain jurisprudence.

Whether the Court makes decisions based on the preferences of Congress, their ideologies, strategic inclinations, or legal factors, it is important to recognize that there are multiple influences that go into play when a judge makes a vote (Gillman, 2001). A combination of the aforementioned theories and ideas help to tell the complete story of how judges make decisions. Considering the variety of established theories on judicial decision making will help guide my understanding of the Supreme Court for the remainder of the section, and help support my eventual theoretical arguments and hypotheses.

Congress and the Supreme Court

Because Congress is the body that passes federal laws that the Supreme Court has the ability to challenge and overturn, a notable actor that may affect Supreme Court decisions regarding such laws is Congress. Drawing support from the strategic actor model, the following studies explain how Congress's presence, preferences, and powers influence the high court's decision making process.

The most obvious reason the Court might consider congressional preferences is the large number of checks that Congress can implement on the Court that can protect legislation and keep the Court from acting out against the Congress. The Constitution of the United States permits Congress and the Executive in some cases to alter the Court's appellate jurisdiction, cut the judicial budget, and change the size of the Court (Segal, Westerland, and Lindquist, 2011). This check on the high court is powerful and threatening, as evidenced by the six times the size of the Court has been changed. And although the Supreme Court's ability to strike down an act of Congress is arguably considered equally forceful, the evidence outlined below suggests otherwise. Despite the Court's ability to reject and invalidate a law, "what Congress may not be able to achieve at wholesale, it may be able to approximate at retail" (Burbank, 1999, pg. 325). Meaning, even if a congressional law is invalidated, the last word with regards to the decisions the judges make ultimately comes down to how much Congress and the President will honor and enforce such decisions. Although significant bills passed by Congress and the President have been overturned, Congress has the last word when it comes to changing the Court system, as well as its ability to reverse Court decisions in statutory cases (Segal, Westerland, and Lindquist, 2011).

Some scholars more seriously consider the threatening Constitutional powers of Congress, and argue that the Court recognizes these powers and acts accordingly in order to protect the Supreme Court as an institution. This idea suggests that a constrained Court, or one who feels pressure from Congress's Court curbing powers will strike down fewer laws, and thus challenge fewer laws as well (Clark, 2009). Whether the Court feels threatened by, or simply agrees with, Congress, many theories posit that the Supreme Court makes decisions in part based on the preferences of Congress.

The most famous theoretical understanding of the Court's power of judicial review comes from Robert Dahl (1957). Dahl views the Court as a member of a national alliance with Congress and the President, and naturally supports the policies of such an alliance (Dahl, 1957, pg. 293). His understanding of the Court rests on the assumption that the Court is more often than not in similar opinion of the two other branches of federal government. Dahl's research demonstrates that the Supreme Court is "no different from the rest of the political leadership," in its opinions on various issues (Dahl, 1957, pg. 294). According to his findings, judicial review is rarely applied because the Court is in sharp disagreement with the other branches of government, since if Congress and the President approve of a law, the Court generally accepts the passage of that law as well. Congress's checks on the judicial branch as well as the perceived support the Court has for Congress suggest that Congress has the upper hand in the balance of power between the two branches.

Of course, the Court can also check Congress. Judicial review is a prime example of this power. The Court may not only invalidate any law passed by Congress but they can also rule unconstitutional any treaties and congressional actions initiated by Congress. The judicial branch interprets laws, telling citizens and the government the final say in what the law is. As the

highest interpreter of the law, the Court obviously has a powerful ability. The sheer means to have “control over elected officials’ behavior and to sanction their unlawful decisions” is significant (Padovano, Grazio, and Fiorino, 2003, pg.53). The Court has the ability to aid or hinder congressional wishes, given its lack of accountability to any constituents and the unique life tenure of Supreme Court justices. Given the powerful ability to strike down laws, judicial review “underscores judicial power vis-a-vis Congress,” and Congress would much rather keep the power to legislate in its own hands, without the interference of the Court (Clark, 2009, pg. 978).

Despite all of the research outlining the many powers each branch has over the other, the tension between these two branches is not very common, and the occurrence of these various checks outlined above is rare. New research conducted by Hall and Ura demonstrates that the Court plays the role of a majoritarian actor when making decisions (Hall and Ura, 2015). Majoritarian, meaning that the Court is aware and acts upon the majority interests of the public and by default the preferences of the elected legislators. Following this research then, and to no surprise, the High Court tends to exercise judicial review in accordance with the lawmaking majorities (Hall and Ura, 2015). This would indicate that laws that have significant support in Congress would be more likely to be viewed with similar support by the Court. This relates to Dahl’s (1957) theories because he similarly provides evidence of the Supreme Court acting in accordance with the preferences of Congress.

Additional research further suggests that Congress and the Court have similar opinions, and are unlikely to step on each other’s toes. Specifically, “one should be careful not to overstate the potential conflict between them, as they often agree on policy” (Uribe, Spriggs and Hansford, 2014, pg. 21). And even if they do not necessarily agree on everything, except in extraordinary

circumstances, does the Court impress its opinions when such opinions are in opposition to those held by Congress and the President (Deutsch, 1968, pg. 203). This literature essentially qualifies Dahl's (1957) assertion that the Court and the other branches are consistently in similar opinion to one another. Similar to Dahl, this research suggests that the Court does have congruent opinions to the majority and to Congress, and only rarely does the Court exercise the power of judicial review.

The Age of the Law

Beyond congressional preferences of a law, other features of the law might affect the Court's propensity to utilize its power of judicial review. A considerable factor that may play in role in how the Justices decide cases regarding federal laws is the age of a law. Public preferences change over time, and there may be a significant difference between how an older law is perceived by the public, the government, and, more specifically, Supreme Court justices.

For example, Dahl (1957) posits that old archaic laws may be outdated and thus fail to represent modern day norms and Constitutional expectations. Others (Clark and Whittington, 2007; Friedman, 2009; Keck, 2007) argue that new laws are fresh in the minds of both the public and the Justices, and have a more likely chance of making their way to the Court. Given these two competing thoughts and the fact that this research is concerned with looking at factors that will affect the law's likelihood of remaining upheld, the year the law was passed in relation to the year of potential challenge may have an effect on how the law will fare in the Court.

The average age of the Court, which is 69.25 years, suggests that many justices represent "the old partisan order," and are much more likely to strike down recently enacted legislation

(Keck, 2007, pg. 322). This is the case particularly with more conservative justices, because newer legislation is less aligned with their political ideologies than older statutes. Additionally, there is much more precedent surrounding older laws. This creates a dilemma in challenging and overturning older laws because of the potential for dissolving years or decades of established case law and precedent.

According to one study, invalidations of federal laws occur more often from recently enacted laws rather than from laws with older history (Clark and Whittington, 2007, pg. 2). The idea that newly enacted laws that spark controversy will be brought to the Court quickly is widespread, and if years go by without a challenge to a particular law, it decreases the likelihood that such laws will be tried by the High Court. Clark and Whittington's study evaluates the rate at which statutes are both upheld or invalidated, and provides conclusive evidence that after one decade after the passage of a landmark statute, the rate at which statutes are invalidated drops significantly (Clark and Whittington, 2007).

Another important consideration in examining the literature regarding the age of law and its relationship to judicial review is public opinion. There is conclusive evidence that the Court is responsive to public opinion and considers the public's interest in a law when making decisions (Friedman, 2009; Rosen, 2006). The Court can identify "strong national sentiment" and takes possible concerns to the bench after a law is passed and its reception by the public is divisive (Rosen, 2006, pg. 4). Strong public opinion regarding two landmark laws, the Affordable Care Act and the Religious Freedom Restoration Act, was expressed by both the general public and state governments, some choosing to enforce and support some provisions of the law, while some ignored major parts of the law all together (Geyman, 2015). Both laws were tried less than four years after they were enacted, showing how quickly the Court responded to the public's

opinions on the two statutes. The Court is the most logical place for a law to go shortly after it is passed, as it gives the third and final branch's approval (or disapproval) of a law. Based on evidence from the literature, it would not be surprising if the age of a law correlates to the application of judicial review.

Divided Versus Unified Government

In addition to the age of the law, the circumstances under which it was drafted might affect its fate before the U.S. Supreme Court. In particular, whether a government is unified, meaning the President and the Congress are of the same party, or divided, when at least one branch of Congress and the President are of different parties, can have consequences for legislative productivity and effectiveness.

Bailey and Maltzman (2008) demonstrate that the political landscape at the time of the law's passage has important consequences for the fate of the law in the future. If there are significant differences between unified and divided government policy outputs, it would thus seem logical that laws would be crafted differently, possibly affecting their future as it relates to judicial review. When a law is passed under unified government, "the laws will be more stable, and the original agreement will last longer" (Shipan and Maltzman, 2008, pg.255). This research contends that the "competition" over crafting new legislation for members of the same Party makes the law more likely to withstand the test of time more so than laws passed by divided governments (Shipan and Maltzman, 2008).

Given that laws that survive longer are less likely to be overturned, laws passed by unified coalitions would subsequently have a favorable advantage in avoiding the Court's

scrutiny (Clark and Whittington, 2007). Aleman and Calvo (2010), evaluating the interaction between Presidents and legislatures and subsequent bill passage, similarly suggest that bills introduced by the majority party in government, particularly when that party is the same as the President, are much more likely to succeed in their efforts to pass strong statutes. Considering one of the major factors the Court takes into account when deciding a case is evaluating legal doctrine and principles of law, the nine Justices are unlikely to challenge or invalidate a law if it is written carefully and within the limits of Constitutionally permissive powers (Bailey and Maltzman, 2008).

Similar support for this line of thinking adopts the view that legislation enacted by a strong unified Congress is in a position “to entrench their policy preferences and protect them from future change” (Shipan and Maltzman, 2008, pg. 252). This continues to lend support to the notion that laws endorsed and passed by the same party actors are powerful and well crafted. This suggests that these laws are more resistant to judicial scrutiny, given the resistance these laws have to any changes or alterations. In addition to producing more sturdy legislation, other studies confirm that unified governments produce more landmark legislation than divided governments, and are also more productive during Congressional sessions (Coleman, 1999). Landmark legislation is not immune from the Court system by any means, because it is often more divisive and salient than less important laws. However, because landmark laws concern important and powerful implications for the public, they must be well crafted to pass both houses and receive Presidential approval.

Additional research aimed at uncovering the difference, if any, between unified and divided government found that there are significant differences in policy outcomes between the two (Epstein and O’Halloran, 1996). Focusing on consequences of divided government in the

context of policy creation and implementation, this study highlights divided government's difficulty responding to adjusting circumstances. It also emphasizes divided government's conflict with other branches and political supervisors when crafting legislation (Epstein and O'Halloran, 1996).

Given the overwhelming evidence supporting unified government productivity, there is still research that argues a different approach. Some scholars suggest that there are no major differences in consequences, in particular with regards to legislation, between unified or divided government (Krehbiel, 1996). This would indicate that the nature of government at the time of a law's passage might not be a determinant of the law's eventual fate in Court, making no difference in the longevity of the laws. The tests below will help to confirm or disprove the ideas surrounding the unified versus divided government theories.

Chapter 3

Theories and Hypotheses

As made clear by the articles and books relating to my topic identified above, there is a plethora of scholarly attention devoted to studying the Supreme Court and Congress. While these studies have evaluated decision making of the Supreme Court, they have only done so occasionally in the context of votes involving federal statutes. And while scholars have focused on judicial decision making carefully, many have only scratched the surface at some of the questions I plan to answer concerning voting patterns on congressional laws. Laws are often ignored as a unit of analysis, leaving specific questions regarding them unanswered.

Knowing what attributes of a law make it more susceptible to judicial review and/or invalidation by the Supreme Court is crucial to many important actors, including but not limited to the general public and Congress. It is surprising that few scholars have considered the important implications of studying laws specifically, given the significance and usefulness of the results. Based on the literature, I have crafted four hypotheses I believe are important in answering some very important questions regarding the application of judicial review on federal laws. My hypotheses below are developed from traditional and well established scholarly work, but also draw from more recent developments in the political science scholarly community. Once tested, my hypotheses, followed by data analysis, will fill some of the holes left by previous scholars' work.

Hypothesis 1a and 1b

The Supreme Court either respects Congress as a legitimate and forceful branch of government, or fears that Congress will disrupt the nature of the judicial branch. Or, it respects *and* fears Congress. As evidenced by the previously outlined theories above, as well as the strategic actor model, it is clear that the Court certainly aligns itself with congressional preferences more often than not. The Court has valid reasons for being concerned about congressional checks on the Court, which may play a role in its decision making. It also takes into consideration the opinions of Congress. The high court has even acknowledged that Congress plays a part in constitutional interpretation as evidenced in the Court opinion by Justice Kennedy in *City of Boerne v. Florida* (Miller, 2016). But, as aforementioned, the Court may not make these decisions based on fear but rather because it is simply a majoritarian actor and considers public and congressional opinions.

Research demonstrates that the Court is a majoritarian actor, taking into account the preferences of the public as well as the legislative branch when making decisions (Dahl, 1957). In addition to evidence presenting the Court as being aware and acting upon majoritarian principles, the Constitution gives Congress more specific powers over the Courts. Congress has multiple duties listed in Article I of the Constitution, whereas the rules of the judicial branch outlined in Article III of the Constitution are vague and could very easily be altered by Congress. The wiggle room in Article III can allow Congress to further constrain the Court's powers, ultimately giving it greater force over the Court. And although there is some evidence suggesting that Congress's institutional powers have no influence over the Court citing that, "obedience over the long term even to congressional statutes can be enforced neither by the sword nor by the purse" (Deutsch, 1968, pg. 216), the above literature suggesting otherwise is more convincing.

The debate between whether the Court acts out of fear of Congress or simply because it is majoritarian is important, but the concern of this paper is not to resolve this debate, but rather to conduct tests to see if Congress's preferences and presence are truly a factor in a judge's decision. Given the evidence supporting both the constrained Court argument and the majoritarian institution argument, I posit that the degree of support a law receives from Congress will correspond to how much the Court will value the law in question. Because the Court is majoritarian and aware of congressional checks on the judicial branch, it would be less likely to invalidate a law that boasts greater support from Congress than a law that is passed by the narrowest of margins. The voting records of federal statutes are public and are at the purview of the Court. Considering the scholarly literature above, it would seem clear the congressional vote share would have a significant effect on the fate of a law.

In addition to measuring congressional support through the votes the law initially receives at the time of passage, I will also measure real time congressional support for a law. This differs from the vote share a law receives, because while the vote share is a measure of congressional support for a law at the exact time of passage, the support for a law changes as the composition of Congress changes as well. Additionally, the congressional preferences present at the time of actual review of a law are extremely important because it is *this* Congress, as opposed to the Congress that originally passed the bill, that has the power to discipline or make adjustments to the Court. While I still believe the vote share will play a role in the outcome of judicial decisions, I predict that real time congressional preferences will have a larger and more significant effect on the Court's voting patterns. To gauge real time congressional preferences of the law after it has been passed, a measure of predicted congressional support for the bill in question will test this hypothesis.

Hypothesis 1a: The more votes a law receives from Congressmen and women, the more likely the law will avoid judicial review, and the more likely to law will not be overturned.

Hypothesis 1b: The higher the level of estimated support Congress has for a law, the more likely the law will avoid judicial review, and the more likely the law will not be overturned.

Hypothesis 2

Relying heavily on Clark and Whittington's study that looks at landmark statutes and the rate at which they are struck down, I posit that there is an important relationship between when the law is passed and when the law is (possibly) tried and/or struck down. While there is not a plethora of research examining this factor when it comes to laws, the Court's attention to public opinion, the older age of the justices, and Clark and Whittington's analysis all support the idea that young laws are more vulnerable to being tried and/or overturned in Court. Major examples such as the Affordable Care Act, Religious Freedom Restoration Act, and the Bipartisan Campaign Reform Act are all landmark laws that have been brought to the court after a few years of passage. Regardless of whether these laws were struck down, in all instances their controversial nature caused litigants to act quickly, bringing a case to the Court. These federal laws are just a few examples of new laws that have had significant effects on the public, and support the notion that newer laws are more likely to be challenged than older laws.

However, Dahl's highly respectable analysis of Supreme Court decision making argues that laws are more likely to be invalidated if they are older certainly weakens this claim (Dahl, 1957). Given my reliance on Dahl's work in crafting both my literature review and theories, it is important not to brush away Dahl's conclusions. The reputable findings he has made concerning Supreme Court decision making deserve attention; however, his analysis of Supreme Court

decision making is very broad and does not analyze the time frame between when a law is passed and when it is tried in great detail. Therefore, I rely more on Clark and Whittington's study when developing this hypothesis, which solely focuses on looking at the time between passage and challenge.

Given the research, I suggest that the younger the law is, the more likely it is to be tried by the Supreme Court. Because the Court is attentive to public opinion, it will respond to initial reactions to laws, hearing such challenges. Laws that have been implemented for a longer time are less likely to be tried and struck down because they are more likely to be consistent with Constitutional principles. If laws avoid stirring public controversy after a few years after their passage, there is a less likely chance that the law will randomly be brought to the Court's attention decades after passage and after precedent has been established surrounding that law. If a law is to be tried, it is more likely that it will happen at the onset of its passage, rather than arousing public opinion bringing it to the Court decades later.

Hypothesis 2: The older a federal law is, the less likely the Supreme Court will challenge and invalidate it.

Hypothesis 3

The literature emphasizes the productivity and success of unified governments, supporting the idea that laws passed by these kinds of governments are stronger, more resilient, and more attentive to other political actors as well as the public's preferences (Aleman and Calvo, 2010; Bailey and Maltzman, 2008). Given these characteristics, including the fact that such laws are stable and last longer, laws passed under unified government would appear to be

less likely to be challenged by the Court (Bailey and Maltzman, 2008). The Supreme Court hears challenges to laws that are questionably unconstitutional, and the above characteristics of laws passed by unified governments suggest that they are not normally of this kind. The evidence in support of such laws is compelling and certainly points in the direction that these laws are ones that tend avoid Court scrutiny.

In addition to highlighting the likely success and stability of laws passed by unified government, scholars also demonstrate the faults of legislation enacted by divided government. If a government passes a law that cannot interact with and respond to the needs of both society and other branches of government (Epstein and O'Hollaran, 1996), then the law is unlikely to go very long without being challenged by the public or the government. Laws that are ignorant of societal and governmental needs are far more likely to be brought to the Court by frustrated parties, thus leaving the court in a more likely position to try and potentially overturn such legislation.

The nature of government certainly has an effect on legislation, as supported by the scholarly evidence. The different dynamics present in unified versus divided government subsequently point to differences in the type of legislation either type of government passes. I hypothesize that laws passed by unified governments are less likely to be challenged and invalidated than laws passed by divided governments. For reasons outlined above, particularly those supporting unified government's ability to develop well-crafted legislation, I believe that the type of government passing a particular statute will affect that statute's future in Court.

Hypothesis 3: Laws passed by unified government are less likely to be tried and overturned than laws passed by divided government.

Chapter 4

Data

The data I am using for my study are principally from Hall and Ura's (2015) collection of 295 landmark Congressional laws from 1949 to 2008. These data are organized in terms of law year, beginning from the year when the law was enacted to 2008. Thus, the unit of analysis for my data is law year and there are a total of 8,485 law years. Because my study is comparing laws that are not tried by the Supreme Court to those that are tried and possibly invalidated by the High Court, these data are ideal for my research as they provide a plethora of laws that fall into both categories. I combined my dataset with data from the Congressional Bills Project for more detailed and specific information on the laws, such as information on who introduced the initial bill to Congress, and the unofficial title of the law. I used this combined dataset to code for my dependent variables, main and control independent variables. Additionally, I gathered data on Congressional voting records from the CQ Press Congress Collection, govtrack.com, congress.gov, and other miscellaneous sources.

Dependent Variables

My main dependent variables are if a law was challenged in a given year and if the law was overturned by the U.S. Supreme Court in a given year. This is a very straightforward measure, and it is coded as "challenge" and "strike" in the dataset. The information on these variables comes from the original Hall and Ura (2015) dataset. They are both coded as a "1" if

the law has been either challenged or struck down in year t , or a “0” if the law has not been neither challenged nor struck down in year t . Each law that is struck down must first be challenged, so laws that are challenged receive a “1” in both categories. In some cases the laws are challenged multiple times, and although rare, some laws are struck down more than once. This is the case because many laws are only partially invalidated and often remain law except for one particular section.

The data reveal that, between 1949 and 2008, the Court struck down laws on 51 occasions. A law was challenged in 122 of 8,485 law years. The chance of a law being struck down when it is challenged is 41.8%, which I calculated by dividing the number of total laws challenged by the number of laws invalidated. The chance of a law being challenged in the first place is only a mere .014%. So, laws are not often challenged, but when they are their likelihood of being struck down increases tremendously.

Independent Variables

Vote Share and Estimated Congressional Support

To test Hypotheses 1a and 1b, I employ two measures to estimate Congressional support for the law. The first measure will examine the vote share the law received *at the time of its passage*. Using ideological preferences, the second measure will estimate the perceived support the current Congress would have for the law were they voting on the law. These measures will align with the concept I am testing in my hypotheses because they are both indicators of congressional preferences, past and present. The data for Congressional vote share on the laws was found on the CQ Congressional database, congress.gov, and govtrack.com. These data will

be used to test Hypothesis 1a. For each law, the dataset lists the number of Yeas in the Senate and the House, Nays in the Senate and the House, and whether or not the vote was a voice vote in the Senate and the House. Voice Votes were given unanimous approval, because when votes are calculated using this method, there is generally no doubt of the approval of the Congressmen and women. I created a measure of total votes for a law combining House and Senate votes to create an overall percentage calculating total votes the law received from both Houses. This variable is a percentage value ranging from 50 to 100 (since votes can only be passed with more than half support). If votes for a particular law could not be found, the data entries were left blank and information regarding vote share for that law will not be used in my analysis.

The mean of the percentage of vote share is 80.01 and the median is 80.05, meaning that most laws in the dataset passed with 80.01% of approval from Congress. The range of this variable goes from 50.66 to 100 percent. The mean of House Yeas is 79.15 with the minimum being 50.23 and the maximum being 100. The mean percentage of Senate Yeas is 83.71 and the range for the Senate is 50.51 to 100. This difference in House and Senate Yea votes is most likely because 27 laws received voice votes from the Senate whereas only 16 laws were conducted by voice vote in the House. Because voice votes were given unanimous approval, the dataset consists of many occurrences where the Senate voted 100-0 on laws, possibly raising the average. Overall, the final count of vote share indicates that more than half of the laws in the dataset were passed with at least 80% support from Congress.

The measure I am using to estimate *current congressional support* for a law is provided in the Hall and Ura (2015) dataset. These data will test Hypothesis 1b. This measure is a predicted probability of the median Congressmen's likelihood of supporting the law if the law was passed during a particular year. This value is a percentage and is measured using Poole and

Rosenthal's (1997) Common Space scores according to the procedure explained by Hall and Ura (2015). This measure changes almost every law year, so a particular law may have many different values for this variable throughout its life. Since the ideological makeup of Congress adjusts every two years, Congress' median preferences change as a result, altering this value. The mean of this variable is .755, meaning that the average support Congress has for a law during a particular year is 76% in support of the law. This value ranges from 64.4 to 93.9 percent.

Law Year

A variable necessary to test for Hypothesis 2 is the amount of time that has passed since the law has been enacted. This relates to this hypothesis because it will tell how old the law is if/when it is challenged or struck down. This variable was included in the Hall and Ura (2015) original dataset and is a value of how many years the law has existed since passage. If the law was enacted in 2000 and it was struck down in 2004, it was challenged and struck during its fourth year as a law. The law years each law has in the dataset ranges from 0 (laws enacted in 2008) to 59 years (laws enacted in 1959). The median is 16 years and the mean is 18.07 years, which indicates that the data provide a plethora of law years consisting of both new and older laws.

Figure 1: Judicial Review In Relation to a Law's Age

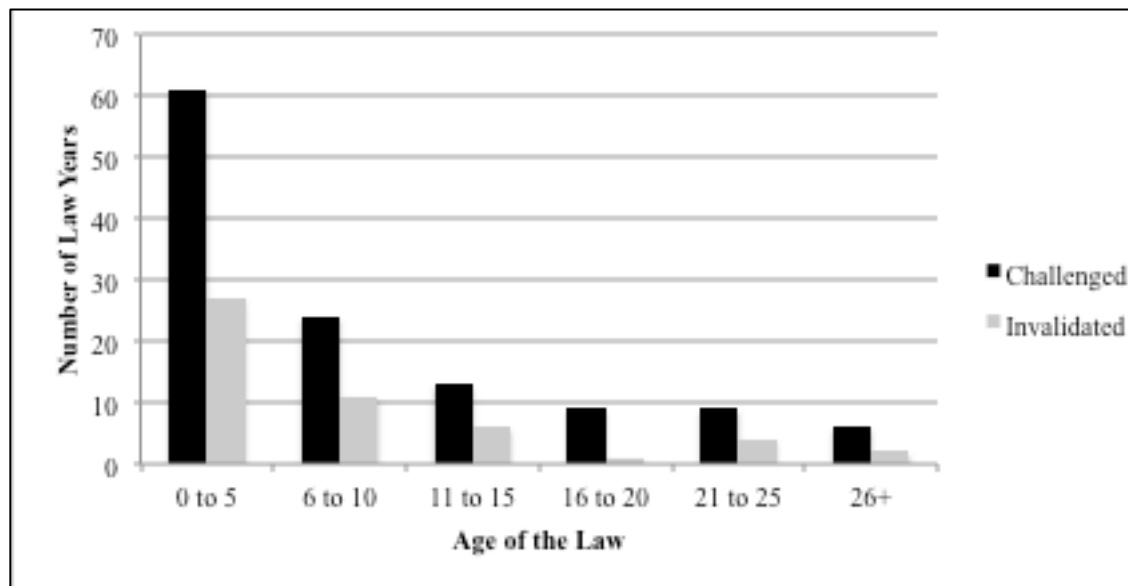


Figure 1 shows when judicial review is applied in the context of the age of the law. As evidenced by the figure, the majority of laws are both challenged and invalidated in their first decade after passage.

Nature of Government

Another important variable to code for is the nature of government at the time of a law's passage. This variable will test Hypothesis 3. I personally gathered these data from a variety of sources including congress.gov and govtrack.com. This variable is coded as a "1" if the government was divided and a "0" if the government was not divided, or unified, when the law was enacted. Unified government is defined as when the President and both houses of Congress are of the same political Party. Divided Congress is when the President is not the same Party as both houses of Congress, or if both houses of Congress are of different Parties. This measurement directly relates to Hypothesis 3 because this hypothesis tests the effect of unified

versus divided government on the application of judicial review. I expect that laws passed under unified government will be challenged and invalidated less often than laws passed under divided government.

There are 118 laws passed by unified government in the dataset and 177 laws passed by divided government. The split is clearly not even, since unified governments passed exactly 40% of the laws and 60% of the laws came from divided government. In terms of the entire dataset, there are 3,938 law years of unified government and 4,598 law years of divided government. This indicates that not only are more individual laws passed by divided government in the dataset, but there are also many more law years present in the dataset that represent laws passed by divided government.

Figure 2: Judicial Review in Relation to the Type of Government that Passes a Law

Type of Government	Laws Years	Law Years Challenged	Law Years Invalidated
Unified Government	3,938	41 (1.04%)	18 (0.46%)
Divided Government	4,598	81 (1.76%)	33 (0.72%)

Figure 2 uses information from the dataset in determining the frequency of laws that are challenged and invalidated examining the type of government. The percentages show what percentage of laws passed by each type of government are challenged and invalidated. This figure shows that laws passed by unified governments are slightly less likely to be challenged and overturned than laws passed by divided governments.

Control Variables

Because ideology does play a strong role in voting decisions and the relationship between Congressional and Supreme Court preferences (Keck 2007; Epstein and Martin, 2011), it is important to control for ideology. There is overwhelming research that supports ideological relationships in decision making. For example, the ideological “leaning” of a law can help determine the fate of it, given that liberal laws are more likely to be overturned by conservative justices than liberal justices and vice versa (Epstein and Martin, 2011, pg. 738). Although my hypotheses do not evaluate individual Justice vote share based on ideology, nor am I evaluating the ideological “leaning” of the law, it is crucial to control for ideological factors, since they could have an effect on my results. To do this I am controlling for the ideological distance between Congress and the Court at the time of the decision. This value is presented as a “0” if the ideological constraint is not present and the difference in median ideological preferences between Congress and the Court is minimal. If median preferences are not similar, the value is the difference between the median Court member and the median Congressmen of the chamber that is closest the Court’s median (Hall and Ura, 2015). Meaning, the higher this value is, the greater the ideological divergence between the two branches. The mean of this value is .3058 and the median is .2262. There are 862 “0” values, so during 862 law years the ideological preferences of Court and Congress were very similar.

Continuing with controlling for ideology, the DW NOMINATE score determines the ideology of the Congressmen introducing the bill. Rather than looking at Party alone, this value rank orders how liberal or conservative the Congressman is. The score ranges from -1 to +1, with values below zero indicating more liberal preferences, and a value of -1 being the most liberal. Any scores above zero mean the Congressman is ideologically more conservative, with a 1 being

the most conservative on this scale. This value is important to control for because Congressmen and women's ideology may play a role in the type of legislation they introduce, thus having an effect on whether or not the law is challenged or invalidated. This would help to control for ideology as this value sheds light on the ideological leaning of the laws.

An additional variable I will be controlling for is whether or not the law was vetoed, since if the law is vetoed it is not looked upon favorably by the President, but has significant support from Congress since it must override the Presidential veto. This variable takes on a simple value of "0" or "1," with a "0" indicating that the bill was not vetoed by the President and a "1" indicating that the law was vetoed by the President. Only 8 total bills in the dataset are recorded being vetoed by the President, consisting of 154 total law years of vetoes.

Chapter 5

Data Analysis

I will test my hypotheses by running logistic regression models to determine the significance and direction of the relationships between my dependent and independent variables. It is important to note that the values displayed on the regression tables are not to be interpreted directly, and only the significance and direction will be used when evaluating the relationships between the independent and dependent variable. This is because I am conducting a logistic regression, which does not produce results that allow for such direct interpretation of the numeric values.

In addition, I also will present predicted probability graphs. The predicted probability graphs will show the likelihood of a law being challenged or invalidated in direct relation to certain significant variables. These graphs will allow for direct value comparisons between my independent and dependent variables.

Challenge Model

My first model (Table 1) tests all three of my hypotheses as they relate to whether or not a law is challenged. I will evaluate all of the variables in this model, primarily those directly related to my hypotheses, and make observations with regards to their relationship to a law being challenged via judicial review.

Table 1: Challenge Logit Model

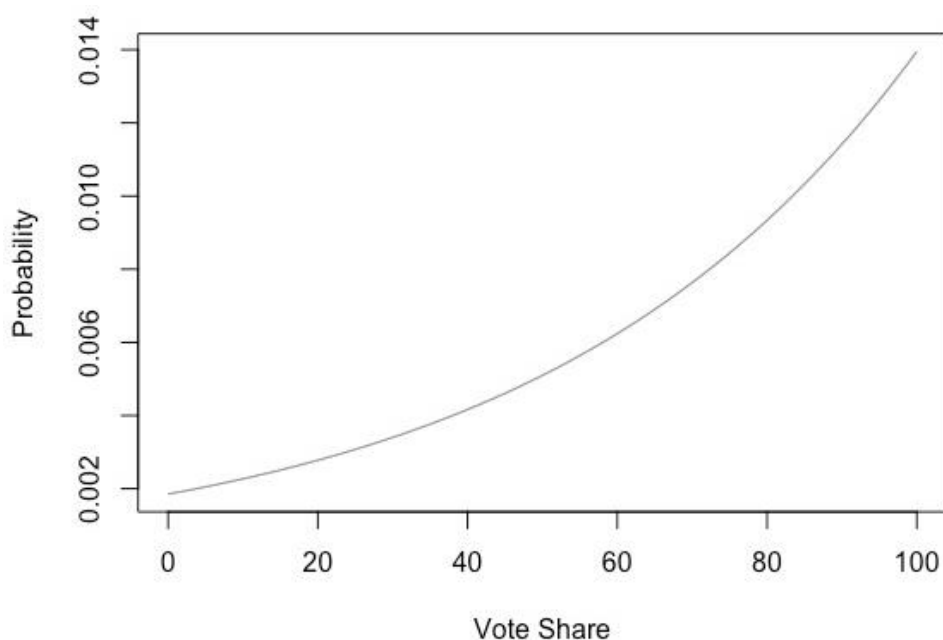
Dependent variable:	

Challenge	
=====	
Vote Share	0.020** (0.010)
Congressional Support	-2.142*** (0.566)
Law Year	-0.190*** (0.072)
Law Year ²	0.008 (0.006)
Law Year ³	-0.0002 (0.0001)
Divided Government	0.105 (0.225)
Ideological Constraint	-0.114 (0.433)
DW NOMINATE Score	-0.514** (0.259)
Veto	-0.221 (0.605)
Constant	-2.893*** (0.613)

Observations	6,029
Log Likelihood	-473.018
Akaike Inf. Crit.	966.036
=====	
Note:	*p<0.1; **p<0.05; ***p<0.01

Hypothesis 1a predicts that the vote share at the time of a law's passage is related to the likelihood of a law being challenged. As indicated by Table 1 above, this variable relates to a law being challenged positively and significantly. Vote share correlates with laws that are challenged in that as the general support for a law increases, the chances the law will be challenged also increase. This is a surprising finding because this indicates that Justices do not pardon laws that have more support from Congress at the time of their passage. The positive relationship the vote share has to laws that are challenged does not support Hypothesis 1a, and this relationship is the opposite of what I would expect.

Figure 3: Predicted Probability of Challenging a Law in Relation to Vote Share¹



¹ All other independent variables are held at their mean values. Estimates calculated using the results from Table 1.

The probability of a law being challenged is related to the vote share the law receives, as evidenced by the Table 1. The larger percentage of votes a law receives, the greater chance that law has of being challenged. Figure 3 shows that as the vote share nears unanimous approval, the predicted probability of a law being challenged rises to a 1.4%. This is over double the chances a law has of being challenged if the law received 60 percent of total votes from Congress.

The variable measuring predicted congressional support at the time of potential review has a negative and significant effect on the likelihood of a law being challenged. As the median congressmen's support for a law declines, the chances of the law being challenged increase. This relationship supports Hypothesis 1b because the Court is reacting to and responding to congressional preferences, since it is applying judicial review to laws that are looked upon unfavorably by Congress. This result differs from the vote share variable in that this relationship between the dependent variable is negative, not positive.

Figure 4: Predicted Probability of Challenging a Law in Relation to Estimated Congressional Support²

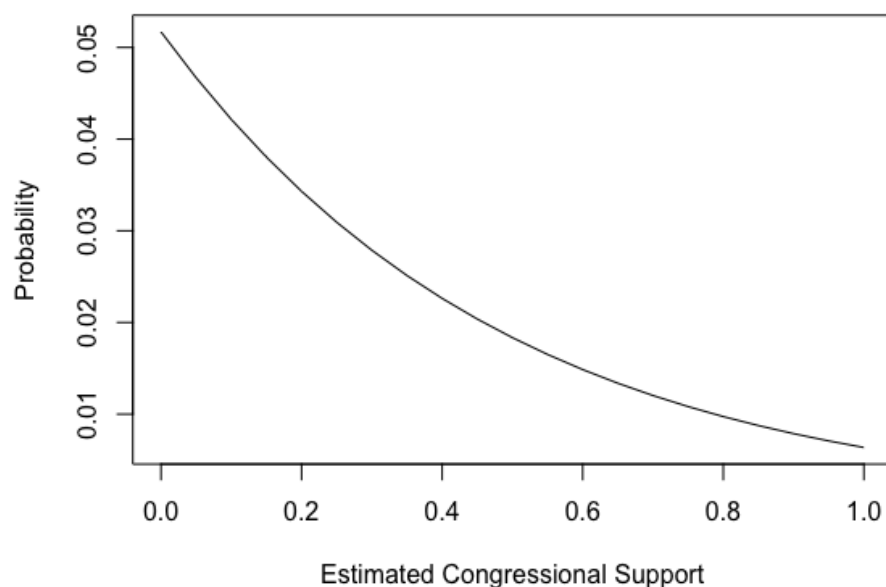


Figure 4 shows the predicted probabilities of a law being challenged when considering that law's estimated congressional support. The probability of a law being challenged in Court is fairly high in this model, ranging from 1% to as high as 5%. Although these percentages are small, it is incredibly rare for a law to be challenged in the first place, only occurring 122 times in my dataset of 8,485 law years. This graph depicts congressional preferences affecting judicial review because as the support for a law nears "1" or unanimous support, the likelihood of a law getting challenged sharply decreases in comparison to a law that receives lower support from Congress. This graph visually shows how the degree of support the current Congress has for a law influences the application of judicial review.

² All other independent variables are held at their mean values. Estimates calculated using the results from Table 1.

Hypothesis 2 is also tested in this model. According to the results, the age of the law has a significant effect on the application of judicial review. As the law's age decreases, the chance that law will be challenged increases. This result supports Hypothesis 2 that suggests the younger the law is, the more likely the law will be challenged.

Figure 5: Predicted Probability of Challenging a Law in Relation to the Law's Age³

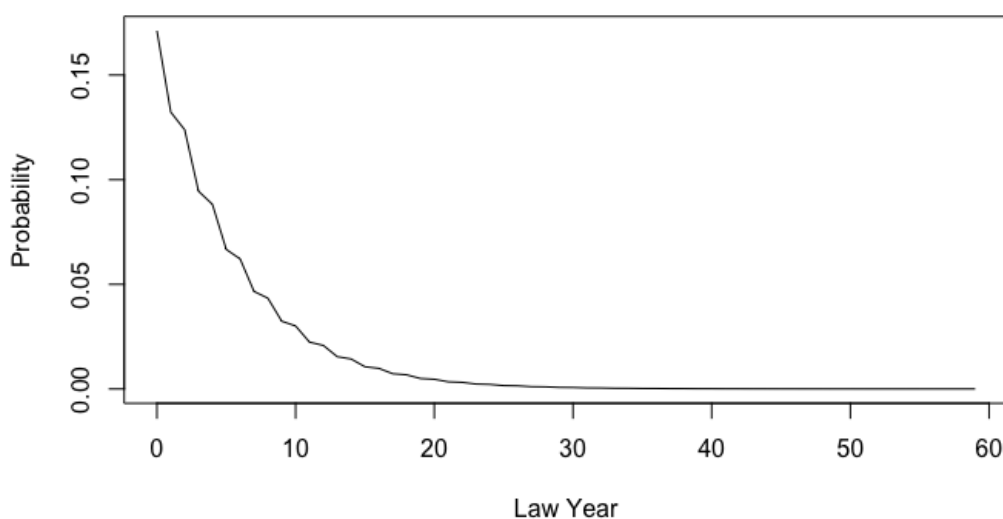


Figure 5 shows the effect the law year has on whether or not the law is challenged by the Supreme Court. As the law ages, the probability of a law being brought to the Court sharply decreases. When a law is first enacted and it is “0” years old, its chances of being challenged are as high as 15%, while after the law has been enacted for five years this chance drops to about 6%. By the law’s fifteenth anniversary, its chances of being challenged are roughly 1%.

The final variable directly related to one of my hypotheses evaluates the nature of government at the time of a law’s passage. This variable is not statistically significant, meaning

³ All other independent variables are held at their mean values. Estimates calculated using the results from Table 1. This line in Figure 5 has jagged edges because this represents the effect elapsed time has on the dependent variable.

there is no relationship between it and the dependent variable. This variable is intended to measure Hypothesis 3, which suggests that divided governments are more likely than unified governments to pass legislation that is challenged. Because this variable is not statistically significant, there is no conclusive evidence that the type of government that passes a law has any effect on whether or not a law is challenged. And although the above Figure 2 shows that the laws passed by unified governments are challenged slightly less often than those laws passed by divided governments, this difference is hardly significant and I cannot draw any conclusions from this. Hypothesis 3 is thus not supported in terms of challenged laws.

The first mentioned DW NOMINATE score of the person who introduced the bill is negatively and significantly related to judicial review. This means that as this score decreases, or the person who introduced the bill is more liberal, the likelihood of a law being challenged increases. Although this result does not support or refute any of my hypotheses, it shows that ideology of the Congressman or woman introducing legislation plays a role in judicial decisions. This possibly indicates that laws introduced by liberal members of Congress are more divisive to the public, thus spurring litigants to bring these laws to the Court.

Lastly, some variables in the model are not significant, and have no effect in determining whether or not a law is challenged. The ideological constraint between the Court and Congress at the time of potential review does not have a notable relationship with my dependent variable. The absence or presence of a Presidential veto over a law also has no significant effect on whether or not a law is challenged.

Invalidation Model

My second model tests the same group of variables, but in this context they are compared to how they relate to a law being struck down by the Supreme Court. In the following paragraphs, “invalidation” takes on the same meaning as “strike.”

Table 2: Invalidation Logit Model

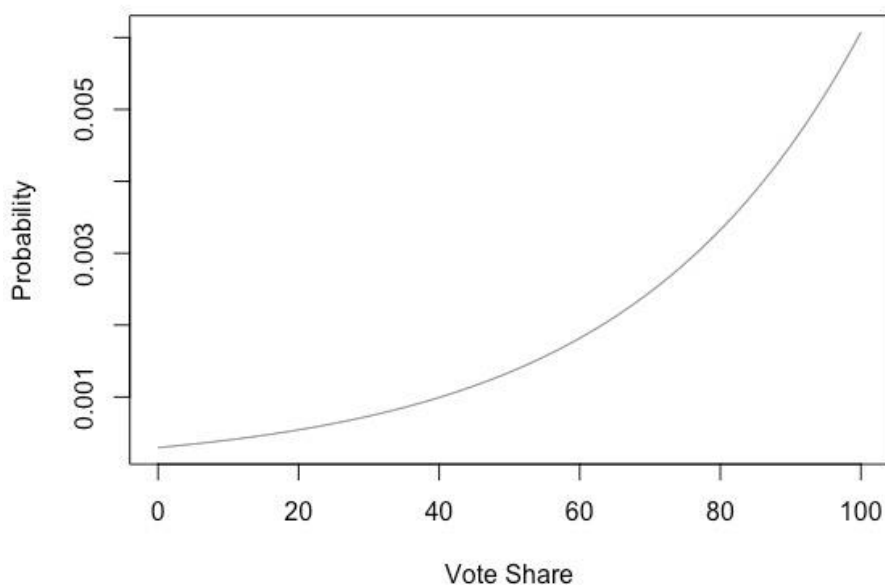
Dependent variable:	

Invalidate	
=====	
Vote Share	0.030** (0.015)
Congressional Support	-2.800*** (0.845)
Law Year	-0.193* (0.103)
Law Year ²	0.006 (0.008)
Law Year ³	-0.0001 (0.0002)
Divided Government	0.097 (0.334)
Ideological Constraint	0.068 (0.632)
DW NOMINATE Score	-0.532 (0.378)
Veto	-0.536 (1.029)
Constant	-3.990*** (0.613)

Observations	6,029
Log Likelihood	-242.935
Akaike Inf. Crit.	505.871
=====	
Note:	*p<0.1; **p<0.05; ***p<0.01

Table 2 tests the same variables as Table 1 does, but this model shows how the variables relate to a law becoming invalidated, rather than just being challenged. The variable testing Hypothesis 1a, Vote Share, is significant. This value is important because it indicates a relationship between the vote share the law received and the likelihood of that law being struck down. It is not surprising that the vote share is correlated to the likelihood of a law being struck down, but once again this relationship is not in the direction I would predict. The relationship is positive and indicates that as congressional votes for the law increases, the likelihood that the law will be overturned also increases. This does not support Hypothesis 1a, since this result suggests that the Court actually goes against congressional preferences of a law when deciding whether or not the strike down laws.

Figure 6: Predicted Probability of Invalidating a Law in Relation to Vote Share⁴

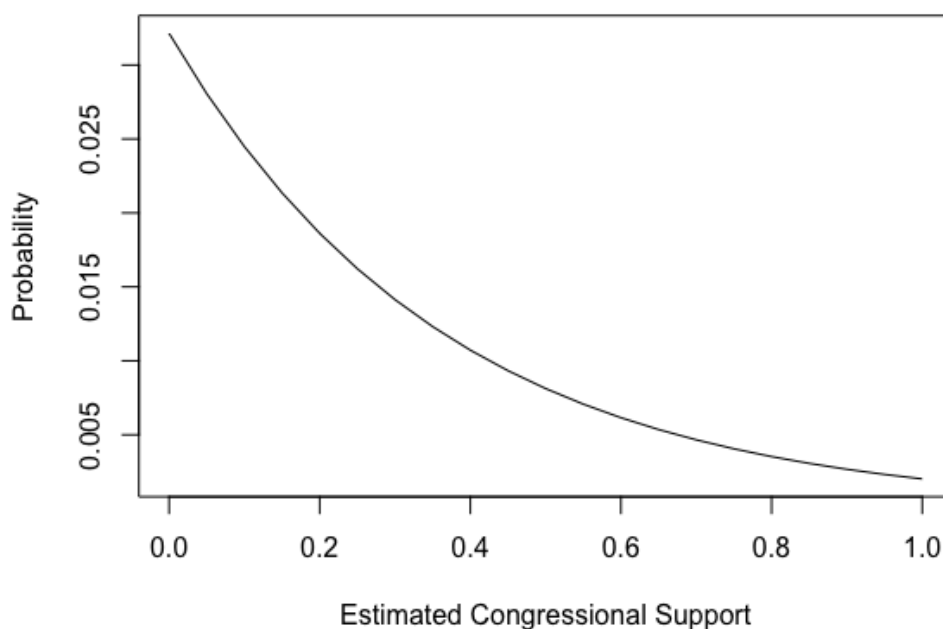


⁴ All other independent variables are held at their mean values. Estimates calculated using the results from Table 2.

Figure 6 shows the predicted probability of a law being invalidated examining the law's vote share specifically. The vote share is calculated in terms of percentages, with 0 receiving no votes from Congress and 100 being full or unanimous approval. As the vote share nears 100, the probability of the law being overturned increases. Although the likelihood only reaches about .6%, it is still more than two times higher than .25%, or the chance a law has of being invalidated when a law receives just 60% of the vote.

The Congressional Support value suggests a significant and negative relationship between the median preferences of Congress at the time the law is being challenged and the likelihood of the law being struck down. Specifically, Table 2 signals that as the support for the law in question decreases, the likelihood of the law being struck down increases. This relationship supports Hypothesis 1b regarding the congruence between Court and congressional preferences. The Court is responsive to Congress's opinions on laws, striking down those that do not have great support.

Figure 7: Predicted Probability of Invalidating a Law in Relation to Estimated Congressional Support⁵



Similar to the predicted probability graph displaying the likelihood of laws being *challenged* based on estimated congressional support, this model tells a similar story. This figure shows the predicted probability of a law being struck down by the Supreme Court. As congressional preferences get closer to 1 or perceived unanimous support for a law, the probability of a law being invalidated decreases to a mere .5%. As the law receives less and less estimated support from Congress, the chances of it getting struck down go all the way up to 3% when support is estimated at a 0 value. The chances are small for this graph in general because of the already very tiny likelihood of a law getting struck down in the first place.

Time is a factor in this model, but its significance is too weak to suggest a strong enough relationship for this variable to truly matter. However, if I would be testing minimal significance,

⁵ All other independent variables are held at their mean values. Estimates calculated using the results from Table 2.

time's inverse relationship to invalidated laws would support Hypothesis 2, which predicts that younger laws are more likely to face invalidation.

In testing Hypothesis 3, whether or not the Congress that passes the law is divided or unified is insignificant to whether or not a law will ultimately be invalidated. Even though Figure 2 above shows that laws passed by divided governments are invalidated slightly more often than laws passed by unified governments, this difference is once again too minimal. Because of the lack of any significant relationship this variable has to a law being invalidated, Hypothesis 3 is not supported for both the challenge and invalidation model (Table 1 and Table 2).

The ideological constraint between the Court and Congress, the first mentioned nominate score of the person who introduced the bill, and the presence or absence of a Presidential veto on a law do not have a substantial relationship to a law's invalidation.

Second Stage Heckman Selection Invalidation Model

In addition to testing models with regards to the relationships between the independent and dependent variables considering all of the laws in my dataset, I also test the law years that are only challenged. The table below shows this, which is a Heckman Selection Model in its second stage. The first stage examines how the variables influence all law years in the dataset of being challenged, which is already addressed in Table 1. The second stage examines only those law years in the dataset that are challenged and looks at what factors, if any, influence the justice's to invalidate challenged laws specifically.

Table 3: Second Stage Heckman Selection Model Testing Challenged Laws⁶

Dependent variable:	
Invalidation	
Vote Share	0.003 (0.005)
Congressional Support	-0.137 (0.303)
Divided Government	-0.002 (0.107)
Ideological Constraint	0.081 (0.210)
First Nominate Score	0.004 (0.149)
Veto	-0.131 (0.311)
Constant	0.680 (0.552)
Observations	6,029
Log Likelihood	-545.124
Akaike Inf. Crit.	-0.326 (0.351)
Note:	*p<0.1; **p<0.05; ***p<0.01

As opposed to the previous two models that draw results from a collection of all of the law years in the dataset, in its second stage, Table 3 only considers challenged law years. It tests

⁶ The variables “Law Year,” “Law Year²,” and “Law Year³” are not included in the second stage of this model because time does not have an effect on the laws that are already challenged.

whether any of the variables in the model play a role in determining whether or not challenged laws will be invalidated. This model is useful because it looks at a specific sample of laws and helps to determine how the variables play a role once challenged laws are evaluated.

Additionally, Table 3 separates challenged statutes from invalidated ones. This is different than Table 2 that looks at invalidated laws and thus by default also includes challenged laws.

The results from this model show that when a law is challenged, no variable has a significant effect in influencing the fate of these laws. This is interesting and shows that once a law is challenged, it is truly difficult to tell whether or not that law that law will be struck down. The age of the law, congressional support, and all of remaining factors have zero effect on whether not a challenged law will become an invalidated one.

Chapter 6

Results

The first two models are quite similar in how the relationships between the independent and dependent variables interact. Because laws that are challenged include more laws in the dataset than laws that are invalidated, it is unsurprising that there are more significant relationships in my model testing the likelihood of laws being challenged.

With regards to the last model, the results do not show any significant relationships between the independent variables and whether or not the challenged law is struck down. This means that when examining just laws that are challenged all of my hypotheses are unsupported and none of the variables in the model affect the occurrence of a law becoming invalidated. Although nothing is significant in this model, when looking at all laws there are still significant factors that affect a law being challenged or invalidated. Only when pulling out the laws that are challenged do these relationships cease to exist and knowing whether or not the challenged laws will be struck is not something I can predict using these results.

Hypothesis 1a and 1b

To first evaluate Hypothesis 1a and 1b, it is important to look at the similarities between the two models. The results from both Table 1 and Table 2 demonstrate that Hypothesis 1a is supported, yet Hypothesis 1b is unsupported. Both models show an inverse relationship between median congressional preferences of a law and the likelihood of that law being struck down,

which supports Hypothesis 1a. However, both models show an interesting and unexpected positive relationship between the vote share and the application of judicial review and exercise of invalidation. As aforementioned, this relationship does not support Hypothesis 1b because it suggests the Court does not consider congressional preferences of the vote during the time of its passage.

The results of these models are important because it suggests the Court is attentive to congressional preferences, but only the opinions of the Congress presiding at the time of the case. The Court is so uninfluenced by the vote share, that this measure actually has the opposite effect on judicial review I expected. The more support a law has initially from Congress, the greater likelihood of a law being heard and challenged. Because both of these models possess these results, I can say with confidence that the Court is responsive to congressional opinions of the Congress presiding over the Court, but is very uninterested and unaffected by the degree of congressional support a law received initially.

If the Court truly feels constrained, these results make sense. If this is the case, it would seem reasonable that the preferences of the current Congress are important since it is the presiding Congress, not the Congress that passed the law, that has the ability to use its institutional powers to change or punish the Court. Unless the law is challenged immediately, the preferences of the two Congress's will differ since the Congress's change every two years and as a result so do the preferences of Congress. Because these relationships are opposite and affect the dependent variable in opposite ways, these results also suggest that the congressional preferences of the Congress that passed the law and the Congress present at the time of a law's potential challenge are very different. This means that opinions for laws must shift considerably from

Congress to Congress, possibly resulting in very diverse and even conflicting positions on laws between older and new Congressmen.

Hypothesis 2

The age of law variable is significant with regards to the challenge model (Model 1), but not in the invalidation model (Model 2). However, it does boast minimal significance in the invalidation model, showing that time does play a role in determining the fate of invalidated laws, but not to a highly significant extent. The negative correlation of this variable supports Hypothesis 2 that predicts younger laws to be more susceptible to judicial review. Hypothesis 2 is my only hypothesis that receives the most support from the results, demonstrating that this factor is the strongest and most consistent indicator of judicial review out of all of my variables.

The results in support of this hypothesis, as well as further support from Figure 1, suggest that laws are very unlikely to be challenged in their later years. These results support the literature that defends the Supreme Court as being responsive to public divisiveness on recently enacted laws. Litigants and those (possibly even Congressmen) opposed to the law may use these results to bring suits to the Court in a law's early years, since it is in these years a Court is more likely to challenge and strike down a law. On the opposite side, Congressmen and women may try to halt the litigation on their coveted laws since they are much more likely to last if challenges are avoided in the first decade after passage.

Hypothesis 3

Moving to Hypothesis 3, the presence or absence of divided government plays no role in a law's fate. Both models showed no significant relationships between this variable and the dependent variables, leading to the conclusion that Hypothesis 3 is unsupported by the data. This result suggests that there are possibly little differences between unified and divided government in terms of policy outputs, or perhaps the legislation they produce is not widely different in terms of quality and adherence to Constitutional principles.

In terms of the literature that led me to this conclusion, I posit a few reasons as to why it was not supported in my results. First, some of the literature was largely based on general conclusions regarding unified and divided governments. I may have tested too specific of a characteristic of such governments for the literature I used to apply to my research. Additionally, I ran tests examining the entire dataset, not specific time periods. While my hypothesis may have been supported in elder periods, the presence of strong polarization and partisanship of Congress in recent governments may have skewed my results.

Additional Variables

The DW NOMINATE score of the member of Congress is significant when examining its relationship with whether a law is challenged or not. However, a significant relationship does not exist when looking at its relationship to invalidated laws. This makes sense, because as aforementioned, there are more challenged laws than invalidated laws in the dataset making relationships stronger and more likely in the former set. This finding is not entirely unsurprising, and lends support to the theories that posit ideology as having a strong role in judicial decisions.

Although the ideology of the Congressmen is not entirely telling of the law itself, it does show that there is a significant difference between laws passed depending on one's ideology. This result may aid in future research and is telling of characteristics that laws possess that affect judicial decisions, but has no direct effect on any of my three hypotheses.

The results of both models show that the ideological distance between the Court and Congress and the presence or absence of a Presidential veto have no effect of the application of judicial review and the invalidation of a law. This is not entirely unsurprising and I will not pay too close attention to the lack of relationships in this paper since neither of these variables relate directly to my hypotheses.

Chapter 7

Conclusion

After conducting tests and analyzing my results, it is clear that there are attributes of laws that affect judicial decisions, either encouraging the application of judicial review or discouraging this power. Some of my hypotheses regarding when the Supreme Court uses this power were supported, while others were not supported. Nevertheless, each time a variable in any model possesses a positive or negative, significant or not significant relationship to the dependent variable, the results are always important and valuable to researchers.

To conclude my paper, it is important to review my hypotheses and the implications the results have for Congress and the Supreme Court. Hypotheses 1a was not supported and results suggested the opposite effect I initially predicted in both Tables 1 and 2, suggesting this relationship for both challenged and invalidated laws. Hypothesis 1b was supported by both tables as well. The meaning of these results can be interpreted in many ways. First, it shows that the Court is primarily concerned with how Congress feels presently. With regards to vote share, my curiosity remains unanswered. Perhaps a strong unified government passes questionably constitutional legislation with overwhelming support and only relates to a certain Party's interests. However, this is unlikely to be the case, as the results also show there is no relationship between the type of government that passes a law and whether or not a law is challenged or invalidated. The Voice Votes that were calculated as receiving unanimous consent may have been an inaccurate measure of coding that particular type of vote. This may have caused laws that did not really receive a lot of support as having received a lot of support according to my

dataset. This would perhaps suggest that laws that received “unanimous support” in my dataset because of the presence of a Voice Vote were not actually supported with such strong support.

Moving on the Hypothesis 2, the results suggest that the age of a law is significant when evaluating the effect it has on judicial review, thus supporting my hypothesis. Although the significance is greater in Table 1, Table 2 still boasts minor significance. Additionally, Figure 1 displays the trends of challenging and striking in the context of law year, further identifying and supporting my hypothesis. These results support claims that laws are brought to the Court as a “final reviewer” of a law and that the Court is in fact responsive to public opinion.

Hypothesis 3 is not supported in any models, indicating that the type of government that passes a law does not have any effect on a law’s likelihood in avoiding the Supreme Court. Although it is disappointing my theoretical argument and subsequent hypothesis were not supported, these results nevertheless shed light on very important information regarding the differences between unified and divided government. So, although a lot of literature posits that unified governments are more productive and are more likely to produce long lasting and well written legislation, this does not have any effect on the law’s chances in Court. So, even if unified governments are more productive, the legislation they produce is not significantly more attentive to Constitutional principles or is anyway immune from the Court.

My research and results can fuel further research projects aimed at uncovering judicial decision patterns as well as investigating more closely laws passed by Congress. A few additions and alterations I would suggest for my study would be to include the extent to which a law was invalidated. The data do not indicate whether or not a law was struck down in part or in its entirety, but coding for this and adding this additional dimension may have shed light on more relationships between my independent variables and my dependent variables. Additionally, using

a larger dataset including more than just landmark legislation would provide a larger picture of this story. Judicial review is not a tool the judiciary exercises regularly, so expanding the dataset may provide more definite results with regards to when judicial review is in fact applied.

Overall, my hypotheses indicate two major conclusions regarding Supreme Court decision making, particularly in the context of its application of judicial review. First, the Supreme Court is attentive and responsive to public opinion and congressional preferences. Hypothesis 1b and 2 both support this statement in that both of these hypotheses developed from theories indicating the Court is a majoritarian actor strongly considering both congressional and public wishes. Both of these hypotheses were supported, demonstrating the Court's willingness to consider and act upon these outside influences, thus refuting arguments penning the Court as an independent decision maker. Additionally, specific attributes of federal laws do not have strong effects on the choices Supreme Court justices make. The type of government that passes a law and the vote share a law receives do not influence the Court to spare its use of judicial review. The Congress at the time of passage is not something that the Court considers. The lack of support for both Hypothesis 1a and 3 suggest that neither the nature of government nor the vote share a law receives affect decision making (at least in the direction I would predict for the vote share hypothesis). The Court will continue to challenge and hear contested federal statutes, and this research will hopefully aid in making predictions regarding what laws will be more likely to be tried and invalidated.

BIBLIOGRAPHY

- Aleman, E., and E. Calvo. (2010). Unified Government, Bill Approval, and the Legislative Weight of the President. *Comparative Political Studies*, 43(4), 511-534.
- Bailey, Michael, and Forrest Maltzman. (2008). Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court. *SSRN Electronic Journal*, 102(3), 369-384.
- Burbank, Stephen B. (1999) Architecture of Judicial Independence. *Faculty Scholarship*. Paper 941.
- Clark, Tom S. (2009). The Separation of Powers, Court Curbing, and Judicial Legitimacy. *American Journal of Political Science*, 53(4), 971-989.
- Clark, Tom S., and Keith E. Whittington. (2007). Ideology, Partisanship, and Judicial Review of Acts of Congress, 1790- 2006. Princeton University.
- Coleman, John J. (1999). Unified Government, Divided Government, and Party Responsiveness. *American Political Science Review*, 93, 821–36.
- Cushman, Barry. (1998). Rethinking the New Deal Court: The Structure of a Constitutional Revolution. New York: Oxford University Press.
- Deutsch, Jan Ginter. (1968). Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science. *Yale Law School Faculty Scholarship Series*, 1(1).
- Dahl, Robert. (1957) Decision-Making in a Democracy: The Supreme Court as National Policy-Maker. *Journal of Public Law*, 6(2), 279–95.
- Epstein, Lee, and Joseph Fiske. Kobyłka. (1992). The Supreme Court and Legal Change: Abortion and the Death Penalty. Chapel Hill: U of North Carolina.
- Epstein, Lee, and Jack Knight. (1998). Choices Justices Make. Washington, DC: Congressional Quarterly Press.
- Epstein, Lee and Andrew Martin. (2011). Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws. *Emory Law Journal*, 61(737).
- Epstein, Lee and Sharyn O'Halloran. (1996.) Divided Government and the Design of Administrative Procedures: A Formal Model and Empirical Test. *The Journal of Politics* 58(2), 373-397.
- Friedman, Barry. (2009). The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution. New York: Farrar, Straus and Giroux.

- Geyman, John P. (2015). A Five-Year Assessment of the Affordable Care Act. *International Journal of Health Services*, 45(2), 209-25.
- Gibson, James L. (1978). Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model. *American Political Science Review*, 72(3), 911-24.
- Gillman, Howard. (2001). Review: What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making. *Law & Social Inquiry*, 26(2), 465-504.
- Hall, Matthew E. K., and Joseph Daniel Ura. (2015). Judicial Majoritarianism. *The Journal of Politics*, 77(3), 818-32.
- Jenkins, Jeffery A., and Eric M. Patashnik. (2012). *Living Legislation: Durability, Change, and the Politics of American Lawmaking*. Chicago: U of Chicago,
- Keck, Thomas M. (2007). Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes? *APSR American Political Science Review*, 101(2), 321-38.
- Krehbiel, K. (1996). Institutional and Partisan Sources of Gridlock: A Theory of Divided and Unified Government. *Journal of Theoretical Politics*, 8(1), 7-40.
- Marshall, Bryan W., Brett W. Curry, and Richard L. Pacelle. (2014). Preserving Institutional Power: The Supreme Court and Strategic Decision Making in the Separation of Powers. *Politics & Policy*, 42(1), 37-76.
- Mcatee, Andrea, and Kevin T. Mcguire. (2007). Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court? *Law & Society Review*, 41(2), 259-78.
- Miceli, Thomas J., and Metin M. Cosgel. (1994). Reputation and Judicial Decision-making. *Journal of Economic Behavior & Organization*, 23(1), 31-51.
- Miller, Mark C. (2016). *The Supreme Court and Congress: Conflicting Institutional Wills*. Separation of Powers Conference. The University of Georgia, Athens, GA.
- Padovano, Fabio, Grazia Sgarra, and Nadia Fiorino. (2003). Judicial Branch, Checks and Balances and Political Accountability. *Constitutional Political Economy*, 14, 47-70.
- Pinello, Daniel R. (1999). Linking Party to Judicial Ideology in American Courts: A Meta-analysis. *The Justice System Journal*, 20(3), 219-54.
- Poole, Keith T., and Howard Rosenthal. (1997). *Congress: A Political- Economic History of Roll Call Voting*. New York: Oxford University Press.
- Rosen, Jeffrey. (2006). *The Most Democratic Branch: How the Courts Serve America*. Oxford: Oxford University Press.

- Rostow, Eugene V. (1952). The Democratic Character of Judicial Review. *Harvard Law Review*, 66(2), 193-224.
- Segal, Jeffrey A. (1997). Separation-of-Powers Games in the Positive Theory of Congress and Courts. *American Political Science Review*, 91(1), 28-44.
- Segal, Jeffrey A., Chad Westerland, and Stefanie A. Lindquist. (2010). Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model. *American Journal of Political Science*, 55(1), 89-104.
- Segal, Jeffrey A., and Harold J. Spaeth. (1993). The Supreme Court and the Attitudinal Model Revisited.
- Shapiro, Sidney A., and Richard E. Levy. (1995). Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions. *Duke Law Journal*, 44(6), 1051.
- Shipan, Charles R., and Forrest Maltzman. (2008). Continuity and Change: The Evolution of the Law. *American Journal of Political Science*, 52(5), 252-67.
- Tate, C. Neal, and Roger Handberg. (1991). Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88. *American Journal of Political Science*, 35(2), 460.
- Uribe, Alicia, James F. Spriggs, and Thomas G. Hansford. (2014). The Influence of Congressional Preferences on Legislative Overrides of Supreme Court Decisions. *Law & Society Review*, 48(4), 921-45.
- Waldron, Jeremy. (2006). The Core of the Case against Judicial Review. *The Yale Law Journal*, 115(6), 1346-1406.
- Whittington, Keith. (2005). Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court. *American Political Science Review*, 99(4).

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